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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 585

RALPH RICHARDSON, Petitioner,

versus

C. C. BRUNNER, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Lower Court failed to pass (or explain why), on constitutional questions raised. pp. 3-4. 15-16. 23-26. 32-33. 40-41.

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IN THE

Supreme Court of the United States

_____ Term.

No. _____

RALPH RICHARDSON, - - - - - - *Petitioner,*

v.

C. C. BRUNNER, - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

Petitioner prays that a Writ of Certiorari issue to review the validity of a default judgment involving the validity of a city tax deed conveying his property to the respondent, and to review four (4) final orders overruling motions to set aside said default judgment, and two (2) opinions and/or decisions of the Court of Appeals of Kentucky—the highest court in the state—which affirmed the lower court. Kentucky Rules of Civil Procedure will be referred to herein as CR No. —, p. —. Reference to record will be R., p. —.

CITATIONS TO OPINIONS BELOW.

The Jefferson Circuit Court did not render any opinions. Opinions of the Court of Appeals of Kentucky affirming the Circuit Court are styled "Richardson vs. Brunner", 327 S. W. 2d 572, and Richardson vs. Brunner, 328 S. W. 2d 530. See Appendix I and II hereto, *infra,* pp. 35-41.

JURISDICTION.

Jurisdiction of this court is invoked on the ground that your petitioner has been deprived of his property without due process of law contrary to Sections 2 and 109 of the Constitution of Kentucky and Section one (1) of the 14th Amendment to the Constitution of the United States. The default judgment sought to be reviewed was rendered October 22, 1956, and affirmed March 6, 1959, rehearing denied October 16, 1959 and also on October 23, 1959. Petitioner believes that 28 U. S. C., Sec. 1257(c) confers jurisdiction on this court to grant him a Writ of Certiorari and he also believes that sub-paragraphs (1) and (6) of (b) of Rule 12, and (h) (1) of Rule 12 of the Federal Rules of Civil Procedure, 28 U. S. C. also confer jurisdiction upon this court to grant him a Writ of Cerfiorari.

QUESTIONS PRESENTED.

1. In the sale of petitioner's property for city taxes to the respondent, the mandatory statutory provisions—the uncontradicted facts so show—were not complied with by the city tax receiver. Hence, the city tax receiver's deeds to the respondent were void *ab initio* and conferred no title whatsoever in respondent. Brunner v. Bell (Ky.), 290 S. W. 2d 461, Brunner v. Morgan (Ky.), 317 S. W. 2d 882. Query, can a court render that valid by default or any judgment which is invalid in its inception? If the court cannot render by judgment that valid which is invalid, is not its judgment attempting to do so void?

2. Respondent's claim, cause of action, if any he has or had, is based and founded upon statutory provisions, that is, whether or not, in the sale of petitioner's property to him, the city tax receiver complied in the sale thereof with the mandatory provisions of KRS 91.470 and 91.480. Since his action or claim is based upon statutory provisions, in order to give the court jurisdiction over the subject matter so as to enable said court to render a valid judgment, it was absolutely necessary for respondent, by pleading, motion, complaint, or petition, not only to set up in his pleading the statutory requirements, but to allege that the tax receiver had complied with them in the sale of the property. Since respondent's complaint was and is fatal, for lack of these material and essential allegations, is not the judgment rendered thereon void?

3. Is not the taking of petitioner's property by and under a void judgment without due process of law contrary to Section 1 of the 14th Amendment to the Constitution of the United States?

4. Is not KRS 91.540 invalid, unconstitutional, in that it authorizes a city tax receiver, a ministerial officer to exercise both judicial and executive functions? It empowers a ministerial officer with authority to convey a fee simple title, without giving the property owner an opportunity to have a judicial, or any, determination of the validity of the tax sale. It makes the tax receiver the sole judge of whether or not he has complied with the mandatory statutory provisions in the sale. It opens the door wide to much mischief. Hence, this is taking petitioner's property without due process of law contrary to the 14th Amendment.

U. S. AND KY. CONSTITUTIONS; KENTUCKY STATUTES; FEDERAL AND KENTUCKY RULES OF CIVIL PROCEDURE AND FEDERAL JUDICIARY AND JUDICIAL PROCEDURE ARE INVOLVED.

Section one (1), 14th Amendment, Constitution of the United States; Sections 2 and 109 of the Constitution of Kentucky; Kentucky Revised Statutes, Sections 411.120, 91.470, 91.480, and 91.540; (1) and (6) of paragraph (b) of Rule 12; paragraph (h)(1) of Rule 12; Rule 55(2)(c); (1), (3) (4) and (6) of paragraph (b) of Rule 60 of the Federal Rules of Civil Procedure, 28 U. S. C.; paragraph (c) of Section 1257 of 28 U. S. C. Judiciary and Judicial Procedure; Kentucky

Rules of Civil Procedure, Rules 1; 12.02(1), (6); 55.02; and 60.02(1), (3), (4), and (6). The pertinent parts of the Constitution, statutes, and the Federal and Kentucky Rules of Civil Procedure above-mentioned, citing the volume and page where they may be found in the official edition, are set out verbatim in Appendix III, *infra*, pp. 42-46.

STATEMENT OF MATERIAL FACTS.

The Facts Material to the Consideration of the Questions Presented as Shown by the Record Herein Are Not Denied by the Respondent or Contradicted by Him, in Any Affidavits, Motions, Pleadings, or Proofs, Except in One Respect, Whether or Not Your Petitioner Had Counsel.

In his brief before the court below respondent said: "These sales are conducted in a regular, legal manner and the law is followed closely". He may make the same statement before this Honorable Court. But, in the case at bar, the record herein itself unequivocally contradicts and denies the accuracy and truth of said statement.

Your petitioner, "is able to write his name, but he cannot read nor write, * * * he has to rely on others for reading and writing * * * he has had no formal education" (Petitioner's Affidavit, R., p. 17). His health has been poor for years (Paragraph II, Petitioner's Supplemental Affidavit, R., p. 48). Judge Thomas J. Knight, in his affidavit, among other things, said:

> "In affiant's opinion, the defendant, Richardson, is an illiterate, uneducated, * * * Negro, who is not fully cognizant of his rights * * *" (R., p. 25).

He was born in Taylor County, Kentucky in 1902, came to Louisville, Kentucky in 1918, worked and saved his money. By August 12, 1946 he had saved $4,000 and on that date purchased the property involved herein for $17,000 by paying $4,000 cash and executing a vendor's lien note for $13,000, payable $125.00 per month (which payments were regularly and promptly made). He spent approximately $6,500 on improvements. In 1950 and thereafter it was and still is worth from $19,000 to $22,000 and there was only a small balance on the vendor's lien note due. See Petitioner's Supplemental Affidavit, Paragraph III (R., pp. 48-50). Arnold P. Simons, his rental agent (R., top p. 52), shortly after his property (the title to which is involved herein) was sold in 1950 for city taxes, informed your petitioner that he had better arrange to redeem. Thereupon:

> "VI. * * * This affiant approached a representative or attorneys for the Plaintiff on several occasions and was unable to deal with them because they wanted more than the taxes, interest and penalties; and that on one occasion he offered to redeem—within the time allowed for redemption, as he now recalls—his property from tax sale by offering the Plaintiff's representatives $1,000.00 and to pay the difference or the balance in monthly payments, and that this offer was more, far more,

than the amount of taxes, interest and penalties then due; that he was unable to raise the money to meet their demands, and that the amount of their demands increased as time went on, and that finally, sometime—he believes—in 1954 or 1955, he is not sure which, they demanded $7,000.00, far in excess of the amount of interest, penalties and costs, and they demanded it in cash, which was impossible for this defendant and affiant to raise, and that the Plaintiff, his Agents and Attorneys have by their exorbitant demands from 1951 on down to the present made it impossible for this affiant to raise the money to meet their demands. He says that the misconduct of the Plaintiff, his Attorneys and Agents, in demanding an exorbitant sum to redeem his property, has made it impossible for him to get up the money to pay it off" (Petitioner's Supplemental Affidavit, R., p. 52).

The real estate involved herein consists of three (3) separate and distinct tracts, any one of them was worth more than the taxes on all of them. The sale of any one of them was all that was necessary to pay the taxes on all three (3), yet the city tax receiver, contrary to the mandatory provisions of KRS 91.480 sold all three (3) of them. Petitioner's tendered (made a part of the record for the purpose of appeal) Answer and Counterclaim (R., pp. 37-38).

Your petitioner had ample personal property available subject to distraint to satisfy his city tax bills.

"V. Affiant further states that in 1950, and each and every year since 1950, he has owned personal property in the City of Louisville and in the

County of Jefferson and in the State of Kentucky which was subject to distraint, and of a value far in excess of any and all current City Tax Bills on real estate, and that none of it was distrained or sold to pay said City Tax Bills of any year since 1950 by the Tax Receiver of the City of Louisville." Supplemental Affidavit of your Petitioner (R., pp. 51-52). Petitioner's Original Affidavit, paragraph 4 (R., pp. 17-18).

From 1951 on until after 1955, see above quotation from his affidavit, your petitioner tried and made several attempts to settle with the respondent and or his attorneys, said respondent's city tax claims against him, but said respondent's demands were so outrageous and exorbitant that it was impossible for him to meet them (Petitioner's Original Affidavit, paragraphs 7-19, R., pp. 18-20, Supplemental Affidavit, R., p. 52).

Respondent and his counsel, by their unreasonable and exorbitant demands for redemption, put your petitioner in a financial strait jacket and thus prevented him, made it impossible for him, to redeem his property or to settle with said respondent and/*or to employ counsel to represent him.*

On May 1, 1956 respondent (R., pp. 8-10), filed his complaint (Appendix IV hereto, *infra,* pp. 47-49) which, as will be hereinafter shown, did not state a cause of action which clothed the court below with jurisdiction over the subject matter. Your petitioner, up until that time had not been represented by counsel, in fact, he had been put in such a financial strait jacket by the acts and conduct of respondent and his counsel

that he could not and did not obtain counsel until after the default judgment. He had consulted only with the respondent's counsel. In his Supplemental Affidavit (R., p. 53), your petitioner said:

"VIII. Affiant further states that he has no recollection of being served with a Summons in this action, but he does not deny that he may have and was served but did not understand or know what it was at the time, and that when he inquired around and found out what it was about he tried to employ several lawyers to represent him, but that each and every lawyer he requested to represent him requested and demanded a substantial cash retainer fee, which he was unable to raise due to the misconduct of the Plaintiff in depriving him of rents, etc., and he was unable to get one to represent him in this action until after a default judgment had gone and he had no pleading in the case. He states that after the default judgment had gone against him, Mr. Stewart Miller agreed to represent him for a fee of $2,000 if he could win it, and then shortly thereafter Mr. Miller urged him to give a quit-claim deed to an undisclosed buyer for anything that he could get out of it, even as little as $10.00, and that he, Mr. Miller, would take $500.00; and, when this affiant refused to comply with Mr. Miller's wishes, counsel and request, Mr. Miller voluntarily withdrew from the case and returned his file to this affiant.

"Affiant says that he was then very discouraged and despondent that he could not raise any money, and he was finally sent to his present counsel, H. E. Rose and Robert Hubbard, who agreed to take his case on a strictly percentage basis. This affiant

says that he did not neglect this case, but tried diligently to obtain counsel to represent him, but could not do so for reasons herein expressed."

Mr. J. B. Gathright, one of respondent's counsel in the court below (see his Affidavit, R., p. 22), said that your petitioner did have counsel, Carl Helman and Thomas J. Knight, but Mr. Carl Helman says that he did not represent your petitioner (see his Affidavit, R., pp. 25-26). Judge Thomas J. Knight says that he did not represent your petitioner (see his Affidavit, R., pp. 24-25).

Hence, because of respondent's and his counsel's unreasonable and exorbitant demands above-mentioned, your petitioner was unable to obtain cash to employ counsel to present his defenses. Result, default judgment of October 22, 1956 (R., pp. 14-15, Appendix V hereto, *infra*, pp. 50-51). Thereafter, he did employ Mr. Stewart Miller as shown above, who filed, on November 23, 1956 (R., pp. 15-16), a motion to set aside said default judgment. This motion was supported by petitioner's Affidavit (R., pp. 17-21), showing (1) that he had ample available personal property (KRS 91.470) which the city tax receiver could have but did not distrain and sell, and (2) that he talked to counsel for respondent—he had none of his own—in several efforts to settle respondent's tax claim, but that their demands were so exorbitant that he could not meet them. He showed other pertinent defensive facts. The Affidavits of Carl Helman and Judge Thomas J. Knight above-mentioned, were also filed at that time, along with the Affidavit of Mr. Charles J. Strull (R.,

pp. 22-24). On December 3, 1956 this motion was overruled (R., p. 16, bottom of page).

On March 11, 1957 your petitioner, by H. E. Rose and Robert Hubbard, filed another motion, supported by supplemental affidavit of petitioner, under CR 55.02 and 60.02 (1), (3), and (6) (R., pp. 34-35), to set aside the above Order of December 3, 1956 and the default judgment, and further moved the court for leave to file an Answer and Counterclaim (R., pp. 36-47), which was tendered and made a part of the record for the purpose of appeal. In his tendered Answer and Counter-claim (R., pp. 36-47), he alleged not merely a valid, but a complete and perfect defense.

Additional significant, uncontradicted and undisputed facts established by petitioner's affidavits, motions and tendered answer and counter-claim are: (1) That on November 21, 1950, respondent paid City Taxes on the property involved in the sum of Three Hundred Eight ($308.34) and Thirty-Four Cents. See Petitioner's tendered Answer and Counter Claim (R., p. 40); (2) That petitioner tried to redeem his property within the time allowed by law and before his property was conveyed by City Tax Deed. See petitioner's supplemental affidavit (R., p. 53), but respondent's demands were beyond his reach, see same affidavit (R., p. 53); (3) That on December 8, 1952, when respondent obtained a city tax deed, he had paid (three years) only Nine Hundred Forty Six ($946.68) Dollars and Sixty-Eight Cents (see Answer and Counter Claim, R., p. 40) in City Taxes on property worth Twenty Thousand Dollars ($20,000.00) or more.

Petitioner's Supplemental Affidavit (R., pp. 48, 49); (4) That on October 22, 1956 (date of default judgment), respondent had paid in city taxes on the property involved only Two Thousand One Hundred Seven Dollars ($2,107.58) and Fifty-Eight Cents (R., p. 40); (5) That petitioner's property was on that date worth between Nineteen Thousand Dollars and Twenty-Two Thousand Dollars (see Petitioner's Supplemental Affidavit, R., p. 49), or approximately ten times the amount that the respondent had paid in taxes; (6) That respondent's demands, Seven Thousand Dollars ($7,000.00) cash were so unreasonable, exorbitant and unconscionable that; (a) He could not meet them, and (b) Was for that reason unable to employ counsel; (7) that the tax receiver did not comply (Answer and Counter Claim, R., p. 38) with the mandatory statutory provision of KRS 91.470 and 91.480 in the sale of his property to Respondent. Therefore, respondent had only a tax lien and not a fee. Brunner v. Bell, *supra*. Respondent's counsel, Mr. Josiah B. Gathright, in his affidavit (R., p. 22) said:

> "* * * Affiant states that he had two conversations with the Defendant in the above-styled action in the summer of 1955 in regard to the repurchase of the property in this action from the plaintiff, C. C. Brunner. There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the said property to Richardson * * *."

Your petitioner's version of these conversations are set out in his affidavit as follows:

"* * * That Mr. Gathright told him that he was washed out, that Mr. Brunner owned the fee simple title and that this affiant did not have any interest in it, and that if he wanted to buy the property back he would have to get Seven Thousand Thirty-Five Dollars ($7,035.00) cash on the line, that it would not be accepted in payments. That he did try to raise some money to meet Mr. Brunner's demand, and went to see a Mr. Strull who would possibly have let him have Four Thousand or Five Thousand Dollars, but no more. Affiant further states that he became very much discouraged; that after that, and before the default judgment, he contacted some attorneys with a view of employing them and that each and all of them wanted a substantial cash retainer fee, and that he could not raise any money with which to employ an attorney, and he became thoroughly discouraged and was mislead by the conduct of Mr. Brunner and his attorney in telling him that he did not own the property any more, and that he was washed out, and many like statements. He further states that he was ignorant of his rights * * *" (R., p. 107).

CR 60.02(6) reads thus, "* * * or any other reason of an extraordinary nature justifying relief from the operation of the judgment."

The Court of Appeals of Kentucky in Hartford Accident and Indemnity Company, Petitioner v. Ray C. Lewis, Judge, Respondent, (Ky.), 296 S. W. 2d 228, p. 231, said: "We hold that ground (6) must be clearly stated in a written motion or petition attempting to invoke it." In view of this statement of the Court of Appeals, petitioner deemed it advisable to amplify his

grounds under CR 60.02(6). He, therefore, on March 22, 1957, renewed his motion to set aside former orders and the default judgment and concluded his motion thus (1) *"That the Quit-claim tax deeds by which the Plaintiff claims title to the property described in his Complaint are void ab initio because of irregularities in the sale, and (2) that for said judgment to remain in force would be unconscionable, would amount to a confiscation of Defendant's property, and would unjustly and inequitably enrich Plaintiff at Defendant's expense"* (R., p. 64).

The Court of Appeals affirmed the lower court on March 6, 1959, and denied a rehearing on October 16, 1959. Richardson v. Brunner, *supra.*

While studying on a petition for a rehearing, your petitioner's counsel became convinced that the default judgment of October 22, 1956, was absolutely void on grounds hereinafter set forth. Thereupon, on March 24, 1959, your petitioner, under CR 60.02(4)—"the judgment is void"—not before invoked herein, again moved the court (R., pp. 103-105) to set aside the default judgment of October 22, 1956. By final order (R., pp. 109-110) April 14, 1959, said motion was overruled by the trial court. (For this motion and order see Appendix VI(a) and VI(b) hereto, *infra,* pp. 52-56). On October 23, 1959, the Court of Appeals of Kentucky affirmed the above order, dated April 14, 1959 of the trial court (Appendix II hereto, *infra,* pp. 40-41).

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED RAISED BY MOTION AND ORDER (R., pp. 103-105, 109-110).

In his motion of March 24, 1959 (R., pp. 103-105; Appendix VI(a) hereto, *infra*, pp. 52-54), your petitioner said:

> "KRS 91.540 is a drastic statute. It is, in reality, in its very essence and nature confiscatory and to avoid the contravention of the fifth and fourteenth amendments of the Constitution of the United States forbidding the taking of one's property without due process of law, both the pleadings and evidence in such a case must clearly and definitely establish that all the mandatory statutory provisions in respect to the tax sale have been complied with. Chaney, *et al.* v. Commonwealth, 314 Ky. 279, 234 S. W. 2d 960. Hence, since all the mandatory provisions of KRS 91.470 and KRS 91.480, hereinabove set forth, were neither pled nor proved, the default judgment herein is void because it takes defendant's property without due process of law."

The order (Appendix VI(b), pp. 55-56) of April 14, 1959 overruling petitioner's motions under CR 60.02(4) "the judgment is void" of the trial court contained your petitioner's objections and concludes in this language:

> "* * * and further objects on the ground that without such allegations in the complaint, it does not give the court jurisdiction of the subject matter to render the default judgment rendered, and that said default judgment is void, and on the

further ground that without said allegations and proof thereof, said default judgment is the taking of defendant's property without due process of law in contravention of the 5th and 14th Amendments of the Constitution of the United States."

Perhaps not as aptly expressed as it could have been, yet, petitioner by this motion definitely raised two Federal questions, (1) that KRS 91.540 permitted the taking of petitioner's property without due process of law contrary to the 14th Amendment, (2) that the complaint did not state a cause of action which clothed the court with jurisdiction over the subject matter, so as to enable the court to render valid judgment. HENCE, PETITIONER RAISED, BY HIS MOTION AND THE ORDER, FEDERAL QUESTIONS, BUT HE COULD NOT COMPEL THE LOWER COURT TO PASS ON THEM. Wilson v. Cook, 327 U. S. 474, 90 L. Ed. 793, 66 S. Ct. 663.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A. The Issue, the Question Involved Herein, Is of Wide Importance Under the Constitution of the United States. It Involves the Security of a National Right, Namely, That a Person Shall Not Be Deprived of His Property—Real Property Here—Without Due Process of Law, Either by a Legislative Enactment or by a Void Judgment.

Your petitioner respectfully submits that the issue involved herein, namely, can his property be taken without due process of law either by a legislative enactment or by a void judgment, or by both, is of very wide importance. It affects every real property owner

under the Government of the United States. For reasons hereinafter specifically set forth, your petitioner further respectfully submits that the issue involved herein cannot be disposed of on a non-constitutional ground, nor can judgment of the court below be sustained on an independent state ground.

B. Void Judgment Creates No Rights.

> "Sec. 45 Void Judgments. * * * It has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights. * * * It may be attacked by any person adversely affected by it, in any proceeding, direct or collateral, at any time. All proceedings founded on a void judgment are themselves regarded as invalid. In other words, a void judgment is regarded as a nullity, * * *". 30A Am. Jur., pp. 107-108.

Among opinions cited are: Shepherd v. Pepper, 133 U. S. 626, 33 L. Ed. 706, 10 S. Ct. 438; Baker v. Weeks, 178 Ky. 515, 199 S. W. 53, L.R.A. 1918C 152; and Vallely v. Northern F. & M. Insurance Company, 254 U. S. 348, 65 L. Ed. 297, 41 S. Ct. 116; Anderson v. Anderson, 161 Ky. 18, 170 S. W. 213, L.R.A. 1915C 581 and many others. See also Brewer v. Burch, 306 Ky. 339, 207 S. W. 2d 562; Woods Bros. Const. Co. v. Yankton Cty, S. D., 54 Fed. 2d 304, p. 309.

C. Petitioner Had a Right to Make a Motion, Under CR 60.02(4) "The Judgment Is Void".

Your petitioner had a right while his appeals were pending in the Court below, to make, under CR 60.02(4), a motion to vacate the default judgment.

Wolfe v. Combs Admr. (Ky.), 273 S. W. 2d 33. The Court erroneously held that "the other three motions which sought the same relief on the same grounds were overruled * * *."

D. Unless Statutory Provisions Are Complied With in the Sale of Real Estate for Taxes, a Tax Deed to the Purchaser Is Void and Conveys No Title Whatever to the Grantee.

"(1) A DEED VOID *AB INITIO* CONFERS NO TITLE WHATEVER UPON THE GRANTEE. * * *

"(2) A TAX DEED DOES NOT CONFER TITLE ON THE GRANTEE IF THE PROCEEDINGS * * * WERE IRREGULAR AND ESSENTIAL STEPS WERE OMITTED. SUCH DEED MAY BE ATTACKED AT ANY TIME BECAUSE IT IS VOID."

Miller, *et al.* v. *Powers, et al.*, 184 Ky. 417, 212 S. W. 453.

"WE HAVE HELD CONSISTENTLY THAT PROCEEDINGS TO SELL PROPERTY FOR TAXES MUST CONFORM TO STATUTORY PROVISIONS, AND PROCEEDINGS WHICH FAIL TO DO SO ARE VOID." Brunner v. Bell (Ky.), 290 S. W. 2d 461.

In Brunner v. Morgan (Ky.), 317 S. W. 2d 862, the Court of Appeals said:

"Appellant contends that KRS 91.480 (3) renders directory KRS 91.470 and 91.480 (1) (2), the same contention was unsuccessfully made in

Brunner v. Bell, Ky., 290 S. W. 2d 461. A full discussion of the statutes and principles involved is contained therein. Brunner v. Bell, *supra*, is controlling here."

This court, speaking by Chief Justice Marshall in Thatcher, *et al.* v. Powell, *et al.*, 6 Wheat. 119, 5 L. Ed. 221, said:

> "That no individual or public officer can sell, and convey a good title, to the land of another, unless authorized to do so by express law, is one of those self-evident propositions to which the mind assents, without hesitation; *and that the person invested with such power, must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this Court.*"

Compliance with all statutory prerequisites must be shown to sustain a tax deed. Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518. A statute providing for the sale of property for taxes must be strictly pursued. Washington v. Pratt, 8 Wheat. 681, 5 L. Ed. 714.

It is settled law in Illinois that a tax title to land is purely technical and depends for its validity upon a strict compliance with the statute. Gage v. Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776. As above shown in Miller v. Powers, Brunner v. Bell, and Brunner v. Morgan, *supra*, the same is true in Kentucky.

See also Marx v. Hanthorn, 148 U. S. 172, 13 S. Ct. 508, 37 L. Ed. 410. The law in respect to tax deeds,

as established by the opinions of this court above has not been overruled.

This court follows the rules of the State courts in such matters. Gage v. Bani, *supra;* Gage v. Pumpully, *et al.,* 115 U. S. 454, 29 L. Ed. 449, 6 S. Ct. 136.

Hence, when by motions supported by affidavits and tendered Answer and Counter-Claim, your petitioner showed facts—*UNCONTRADICTED FACTS*, namely; that, in the sale of his property to respondent, the statutory requirements of KRS 91.470 and 91.480 were not complied with in the sale thereof, he established, beyond question, that the tax deed to the respondent of his property was and is void— void *ab initio,* void in its inception. Hence, the default judgment was and is void, for a court cannot by decree or judgment, default or otherwise, render that valid which is invalid in its inception. Hence, petitioner's property was and is taken without due process of law under the 14th Amendment.

E. Where Actions Are Based on Statutes, They Must Be Plead or Judgment Is Void, and It Takes Property Without Due Process.

Respondent's action, if any he has, is based on statutory provisions KRS 411.120 to quiet title, or under KRS 91.470, 91.480, and 91.540, or on both. In any event, in order to clothe the court with jurisdiction over the subject matter, he must plead the provisions of the statutes upon which his action is based or any judgment rendered on his motion, complaint, or plead-

ing, is void. In Carpenter v. Moorelock, etc., 151 Ky. 506, 510, 152 S. W. 575, the court said:

> "When the statute provides a method by which the property may be reached it is not only to be strictly followed but it must be followed to the exclusion of any other method not also clearly provided."

In Wagner, *et al.* v. Peoples Bldg. and Loan Assn. 292 Ky. 691, 167 S. W. 2d 825, the court said:

> "THE FINAL CONCLUSION BEING THAT A SUBSTANTIAL COMPLIANCE WITH STATUTORY REQUIREMENTS TO OBTAIN SUCH A DECREE MUST BE FOLLOWED; OTHERWISE THE JUDGMENT WILL BE VOID."

Liberal Rule 8.01 of Kentucky Rules of Civil Procedure, where a cause of action is based on statutes, does not obviate the necessity of setting up the statutory grounds. Rule 1, of said Kentucky Rules, reads, in part:

> "These rules govern the procedure and practice in all Courts of this State * * * with the exception that they do not govern procedure and practice in any special statutory proceeding * * *."

Johnson v. Coleman, *et al.* (Ky.), 288 S. W. 2d 348; Hodges v. Hodges (Ky.), 314 S. W. 2d 208.

F. Respondent's Action, If Any He Has, Is One to Quiet Title.

Respondent's Complaint, although he claims to base it on his alleged right under KRS 91.540, is in reality a suit to quiet title and is governed by KRS 411.120. To state a cause of action under KRS 411.120, which would clothe the court with jurisdiction over the subject-matter, he must allege that he has possession, not that he is entitled to possession, or else his Complaint is fatally defective and any judgment rendered on it is void. Haws v. Short (Ky.), 304 S. W. 2d 924. Hence, the default judgment herein being void, deprives your petitioner of his property without due process of law.

G. Compliance With the Statutory Provisions of KRS 91.470 and 91.480 Must Be Plead in Connection With KRS 91.540; Otherwise, a Cause of Action Is Not Stated Which Clothes the Court With Jurisdiction Over the Subject Matter.

KRS 91.470 and 91.480 set forth the provisions which the City Tax Receiver must comply with in the sale of real estate for city taxes. The validity of respondent's tax deeds are not based simply upon KRS 91.540, but upon whether or not the provisions of KRS 91.470 and 91.480 above have been complied with. Hence, in order to state a cause of action which clothed the court with jurisdiction over the subject matter either by a Complaint or Motion, it was necessary for respondent to specifically plead and prove

that the City Tax Receiver had, in the sale of your petitioner's property to the respondent, complied with the above-mentioned sections of the statutes. Miller v. Powers, *supra;* Wagner, *et al.* v. Peoples Bldg. and Loan Assn., *supra;* Brunner v. Bell, *supra;* Brunner v. Morgan, *supra;* Lorton, *et al.* v. Ashbrook, *et al.,* 220 Ky. 830, 295 S. W. 1027; Lowther *v.* Moss, 239 Ky. 290, 39 S. W. 2d 501; Soper, *et al.* v. Foster, *et al.,* 244 Ky. 658, 51 S. W. 2d 927. In Woods Bros. Constr. Co. v. Yankton County, S. D., *et al., supra,* the U. S. 8th Circuit Court of Appeals said:

> "In United States v. Turner, 47 F. 2d 86, 89, this Court said: 'BUT ALL COURTS RECOGNIZE THAT, WHERE THE COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER, THE JUDGMENT IS NOT MERELY VOIDABLE BUT IS ABSOLUTELY VOID.' See, also 33 Corpus Juris, p. 1075, Sec. 36; 1 Freeman on Judgments, Sec. 117."

H. KRS 91.540 Is Invalid, Unconstitutional, in Contravention of Section 2 and 109 of the Constitution of the State of Kentucky and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 2 of the Constitution of the State of Kentucky, is, in part: "Absolute and arbitrary power over * * * property of Freemen exists nowhere in a Republic, not even in the largest majority." Section 109 of Kentucky's Constitution is, in part: "The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in * * * one

Supreme Court (to be styled The Court of Appeals) and the courts established by the Constitution." Section 1 of the Fourteenth Amendment to the Constitution of the United States is, in part: "* * * nor shall any state deprive any person * * * of property, without due process of law * * *."

KRS 91.540 clothes and empowers a ministerial officer—the City Tax Receiver—with the absolute and arbitrary power and authority to convey the fee simple title of the owner of real estate without giving said owner an opportunity to have a judicial or any determination as to whether or not said tax receiver in the sale of his property has complied with the mandatory statutory provisions of KRS 91.470 and 91.480. Williams v. Wedding, Judge, 165 Ky. 361, 376-379, 176 S. W. 1176. Within the meaning of "due process of law" KRS 91.540 is in contravention of Section 2 of the Kentucky Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Hence it is invalid and unconstitutional. City of Corbin, *et al.* v. Hays, *et al.*, 244 Ky. 33, 50 S. W. 2d 31, 33. KRS 91.540 is invalid and unconstitutional in that it vests in the City Tax Receiver (both executive and judicial) the absolute and arbitrary power to be the sole judge of his own acts, that is, whether or not he has complied, in the sale of real estate for taxes, with the mandatory provisions of KRS 91.470, 91.480. Such absolute and arbitrary power—both executive and judicial—conferred upon the City Tax Receiver, clothes, authorizes and empowers him to convey the fee simple title to real estate without due process of

law contrary to Section 2 and 109 of Kentucky's Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Turner v. Peters, Police Judge of the City of Hazard (Ky.), 327 S. W. 2d 958, 959. See also Slaughter v. Post, 214 Ky. 175, 282 S. W. 1091; City of Jackson v. Murray-Reed-Slone and Company, 297 Ky. 1, 178 S. W. 2d 847; Colyer v. City of Somerset, 306 Ky. 797, 208 S. W. 2d 976.

To comply with due process of law, Federal, State, County and Municipal Governments, in the exercise of eminent domain over private property for public purposes, must give the property owner an opportunity for a judicial hearing as to the value thereof. No absolute monarch in all the pages of history ever exercised a more arbitrary and despotic power over the property of his subjects for taxation than KRS 91.540 grants to City Tax Receiver. This section certainly deprives your petitioner of his property without due process of law.

In his briefs in the court below, respondent said that governments, including a municipal government, must be supported by taxation and they must have authority to collect them. Petitioner concedes this. But, when the State undertakes to confer upon a ministerial officer the absolute right (both executive and judicial authority) to convey the fee simple title without giving the property owner a judicial or any opportunity to be heard as to the validity of the tax sale, the property owner is deprived of his property without due process of law. Chief Justice John

Marshall in McCullough v. Maryland, 17 U. S. 316, 4 Wheat. 316, 4 L. Ed. 579, 607, said that "the power to tax involves the power to destroy." History's pages from time immemorial, discloses that the abuse of taxing power is one among the most potent factors in the downfall of governments. Any judgment based on an invalid statute is void.

I. The Court Below Committed Three Errors, Which in Reality by Judicial Fiat or Decree Deprived Your Petitioner of His Property Without Due Process of Law.

In considering the opinions (1) Richardson v. Brunner, 327 S. W. 2d 572, and (2) Richardson v. Brunner, 328 S. W. 2d 530, of the court below, it is respectfully submitted that this Honorable Court should bear in mind that the three appeals in (1) above were from final orders refusing to set aside the default judgment under CR 60.02 (1) * * * "Excusable neglect"; (3) "* * * misconduct of adverse party;" (6) "any other reason of an extraordinary nature justifying relief from the operation of the judgment." The opinion in (1) above was handed down on March 6, 1959. On those appeals—in (1)—no question under CR 60.02 (4) "the judgment is void," had been raised or was before the court by any motion or pleading, or even by implication. Hence, the validity of the judgment was not and could not have been passed on in (1) above for it was not raised until March 24, 1959. The motion of March 24, 1959, was based on the ground not then before the court; namely, that the default judgment was void for two reasons; one that the Com-

plaint did not state a cause of action which clothed the court with jurisdiction over the subject matter which authorized and empowered the court to render a valid judgment; two, and that KRS 91.540 was and is unconstitutional in that it took your petitioner's property without due process of law.

1. The First Error Consists In Basing Its Opinion of March 6, 1959 (Richardson v. Brunner, 327 S. W. 2d 572, 1, *Supra*, Appendix I, *Infra*, p. 35), Upon Two of Its Opinions; Namely, Dant v. Progress Paint Company (Ky.), 309 S. W. 2d 187, and Fortney v. Mahan (Ky.), 302 S. W. 2d 842. The Dant Case Has No Application Whatsoever and Is Clearly Distinguishable. As Applied By the Court Below, the Fortney Case Has No Application Whatsoever and Is Clearly Distinguishable. But, If the Court Below Had Properly Applied the Fortney Case (As Is Hereinafter Clearly Shown On Pages 31-32) to the Facts In the Case At Bar, It Would Have Set Aside and Vacated the Default Judgment.

NEITHER YOUR PETITIONER NOR THE RESPONDENT, IN THEIR BRIEFS BEFORE THE COURT BELOW, MENTIONED EITHER THE DANT OR THE FORTNEY CASE, *SUPRA*.

A. DANT CASE NOT APPLICABLE, CLEARLY DISTINGUISHABLE.

The facts in the Dant case, as stated by the Court of Appeals of Kentucky, are as follows:

> "Appellee filed this action against Paul Dant to recover the unpaid balance of a foreign judgment. Dant, as his sole defense, asserted that the judgment sought to be collected was void for want of personal service. Appellee filed a motion for summary judgment together with supporting affi-

davits, and Dant filed counter affidavits. On February 17, 1955, the Court upon hearing the motion for summary judgment ordered that the supporting affidavits be considered as supplemental pleadings and further ordered that the proof be taken by and submitted on depositions. It was Dant's burden to prove that the foreign judgment was void as charged in his answer * * *.

"Dant's attorney so advised and told him that that he must make arrangements to pay the necessary reporting fees. Dant then dismissed this attorney and employed another. No proof was taken pursuant to the Court's order. Consequently, on or about October 7, 1955, notice was served on Dant's attorney advising that, on October 13, 1955, motion for judgment would be made by plaintiff because of defendant's failure to take proof and meet the burden. Neither Dant nor his attorney was present on October 13, 1955. Judgment, however, was not taken on that day. The hearing was continued until October 21, 1955, and notice to that effect was duly served on Dant's attorney. Neither Dant nor his attorney appeared on October 21, 1955, and judgment was entered for the sum demanded in the Complaint."

From the undisputed facts hereinabove related in the case at bar, it will readily be seen that the Dant case is not analogous or similar and that it is clearly distinguishable and has no application to the instant case. Hence, the lower court erred in basing its opinion on the Dant case.

B. FORTNEY CASE AS APPLIED BY THE COURT BELOW IS NOT APPLICABLE—CLEARLY DISTINGUISHABLE.

The Court of Appeals of Kentucky cited Fortney v. Mahan (Ky.), 302 S. W. 2d 842, to the effect that the trial court did not abuse a sound discretion in overruling petitioner's motions, under CR 60.02, (1), (3), (6), to set aside and vacate the default judgment.

In that case appellant's counsel on the trial of the case in the lower court deliberately withheld from the evidence certain deeds and a probate record. Then being—

> "unsuccessful in proving his claim on the trial, Fortney attempted on appeal to supplement the record by filing six deeds which had not been introduced in evidence during the trial. We held in Fortney v. Elliott's Admr. (Ky.), 273 S. W. 2d 51, that additions could not be made to the record of matters not considered by the trial court, and affirmed that part of the judgment decreeing the sale of the lands and apportioning distribution of the proceeds."

In the Fortney case there was not a default judgment, but a trial on the merits, appellant being represented by counsel. In that case appellant had opportunity to present his "claim" evidence on the trial. From the undisputed facts hereinabove related in the case at bar, it will readily be seen that the Fortney case is not analogous or similar and that it is clearly distinguishable and has no application to the instant case. Hence the lower court erred in basing its opinion on the Fortney case. Bargo v. Lewis, Judge (Ky.), 305 S. W. 2d 757 is applicable.

2. The Second Error of the Court of Appeals of Kentucky Consisted In Its Failure to Apply the Applicable Law, Which It Had Theretofore in a Long Line of Opinions Established as the Law In Kentucky Relating to Setting Aside Default Judgments.

A. DEFAULT JUDGMENTS NOT FAVORED.

In Bargo v. Lewis, Judge, *supra*, and many other opinions, the Court of Appeals has held that default judgments are not favored.

B. IF IT APPEARS FROM TENDERED ANSWER THAT DEFENDANT HAS A MERITORIOUS DEFENSE THE DEFAULT JUDGMENT WILL BE SET ASIDE.

In Bargo v. Lewis, Judge, supra, the Court of Appeals of Kentucky said:

> "Default judgments are not favored, and it appears from the tendered answer that the defendant has meritorious defenses",

and set aside the default judgment. See also Bishop v. Bishop, 213 Ky. 703, 281 S. W. 824; Carr Creek Community Center, Inc. v. Home Laundry Co., *et al.*, 276 Ky. 840, 125 S. W. 2d 777. Carr, *et al.* v. Brownfield, 255 S. W. 2d 623. Petitioner's tendered Answer and Counter-Claim (R., pp. 39-40), presented a complete and perfect defense.

C. EXCUSABLE NEGLECT—ILLITERATE—IGNORANT OF RIGHTS.

The Court of Appeals of Kentucky has many times held that default judgments will be set aside where it appears that there is excusable neglect, etc. See Richardson v. McCoy, 178 Ky. 677, 190 S. W. 787.

D. ACTS OR CONDUCT OF OPPOSING PARTY THAT MISLEADS OR PREVENTS DEFENSE.

In Strother v. Day (Ky.), 248 S. W. 2d 347, the court said:

> "That if before judgment was rendered the prevailing party or his attorney said or did anything that put his adversary off guard, or prevented him from defending the action, and he shows that he had a *prima facie* valid defense, he is entitled to relief from the judgment' ".

It is respectfully submitted that the Court of Appeals of Kentucky erred in failing to apply the sound principles of law, justice and equity and good common sense which they themselves have established in the setting aside of default judgments. Johnson v. Gernert Bros. Lbr. Co., 255 Ky. 734, 75 S. W. 2d 357.

E. RESPONDENT WOULD NOT BE INJURED BY SETTING ASIDE DEFAULT JUDGMENT—NO INNOCENT THIRD PARTIES.

Even under the authority of Fortney v. Mahan, *supra*, cited by the court below to sustain their first opinion, your petitioner should have been granted relief for in that case the court, speaking of setting aside judgments and granting a new trial said:

> "Two of the factors to be considered by the trial Court in exercising its discretion are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought to be inequitable to other parties."

Petitioner made timely motions to set aside the default judgment. He tendered answer and counterclaim containing a valid and perfect defense. He should have been given an opportunity to present his defense on the merits and the granting to him of this relief would not have been inequitable to the respondent for said respondent still had his tax lien and no innocent parties were affected.

3. The Third Error of the Court Below Is In Its Opinion of October 23, 1959—Richardson v. Brunner (2 Above) 328 S. W. 2d 530, Appendix II, *Infra*, pp. 40-41, It Is Threefold.

First, the court held "the other three motions" * * * "sought same relief on the same grounds * * * and" * * * were all dealt with in the opinion styled Richardson v. Brunner, 327 S. W. 2d 572, Appendix hereto 1, *infra*, pp. 35-39. This was error, see p. 26 above; second, in holding that the motion of March 24 1959 (after the opinion of March 6, 1959, had been rendered) under CR 60.02(4) "the judgment is void" was an attempt to relitigate the questions on the first appeal, under CR 60.02(1) * * * "excusable neglect"; (3) * * * "other misconduct of an adverse party"; (6) "any other reason of an extraordinary nature justifying relief from the operation of the judgment" and in holding that the validity ("the judgment is void") of said default judgment was decided on those appeals and hence the opinion on the first of these appeals was *res judicata*. THE THIRD PHASE OF THIS THIRD ERROR (WHICH MOST CERTAINLY WAS NOT LITIGATED IN

THE FIRST OPINION) CONSISTED IN THE COURT'S ERROR IN FAILING TO PASS ON THE CONSTITUTIONAL QUESTIONS RAISED OR TO MAKE ANY EXPLANATION OR GIVE ANY REASON FOR NOT PASSING UPON THEM.

CONCLUSION.

For the foregoing reasons: namely, (1) that the default judgment is void; (2) that the taking of your petitioner's property under void judgment is taking it without due process of law; (3) that KRS 91.540 is unconstitutional; it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I.

COURT OF APPEALS OF KENTUCKY

RENDERED MARCH 6, 1959

RALPH RICHARDSON, - - - - - - *Appellant,*

v.

C. C. BRUNNER, - - - - - - - - *Appellee.*

Appeal from the Jefferson Circuit Court,
Chancery Branch—First Division,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE BIRD—AFFIRMING; REHEARING DENIED OCTOBER 16, 1959).

This action involves the title to real property.

On October 22, 1956, a default judgment was entered against Ralph Richardson in favor of C. C. Brunner.

On November 23, 1956, Richardson filed a motion to vacate the default judgment under CR 55.02 and 60.02(1-3-6). Various affidavits were filed in support of the motion and against it. The motion was heard and overruled by order on December 3, 1956. On December 28, 1956, Richardson filed a notice of appeal by which he appealed from the order of December 3, 1956, refusing to vacate the default judgment.

On March 11, 1957, Richardson filed another motion under CR 55.02 and 60.02(1-3-6) to vacate the default judgment of October 22, 1956, and the order of December 3, 1956,

overruling his first motion to vacate under CR 55.02 and 60.02(1-3-6). This second motion of March 11, 1957, to vacate was overruled on March 15, 1957, and on the same day he filed his notice of appeal from the ruling on the second order denying relief under CR 55.02 and 60.02(1-3-6).

On March 22, 1957, Richardson filed a third motion to vacate under CR 55.02 and 60.02(6) which sought to vacate all previous judgments and orders refusing relief under CR 55.02 and 60.02. This order was overruled on March 22, 1957, the day it was filed. Notice of appeal from that order was filed on the same day.

Richardson has appealed from each of the three orders denying him relief under CR 55.02 and 60.02(1-3-6).

We shall discuss the appeals in the same order in which they were taken. The rules relied upon read as follows:

55.02

"For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

60.02

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment. * * *"

Let us consider the first motion to vacate under CR 60.02. For the purpose of this discussion we shall assume that the defendant, Richardson, had a valid defense. While highly questionable we shall likewise assume that he properly defined that defense in his motion. This does not of itself entitle the defendant to the relief sought. He must explain why he did not present that defense upon the trial and thus excuse his default. Paul C. Dant v. Progress Paint Mfg. Co., Ky., 309 S. W. 2d 187.

Let us consider his reasons for not defending:

(1) He says that Brunner's counsel so misrepresented certain facts to him that "he had given up all hope of saving his property" to which Brunner held a tax deed. There were some negotiations between Richardson and Brunner's counsel but the record shows that these negotiations occurred almost a year before the suit was filed. The record also discloses an affidavit by Brunner's counsel in which it is specifically sworn as follows: "There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the property to said Richardson." If representations made long before the filing of the action may be considered within the purview of CR 60.02, the court nevertheless had sufficient evidence upon which to determine the issue against Richardson and find that there was no misrepresentation or misconduct on the part of Brunner or his counsel. We would therefore not disturb the determination of the trial court.

(2) He says that he couldn't defend the action because of his inability to pay an attorney to represent him. However, the record shows that he did procure an attorney shortly after the default judgment was taken. He does not undertake to say that he did not have the same resources before the default judgment as after. In fact, the record discloses that he owned property other than that involved

in this action. The record also shows that, during the year in which this action was originally filed, he was collecting rent. The record shows that he had from May until late October to make arrangements for counsel. There is sufficient evidence in the record upon which the court might determine that Richardson was able to employ counsel, and there is nothing in this motion to show that he tried to employ counsel.

(3) Finally he gives his ignorance and illiteracy as an excuse for not defending the action. He may be uneducated but the record, words to the countrary notwithstanding, shows Richardson to be a rather intelligent person. The record discloses that he knew enough to seek advice of counsel on matters about which he was uninformed. He did that before the action but there is nothing in his motion or affidavit to show that he sought advice after the action was filed.

Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. Fortney v. Mahan, Ky., 302 S. W. 2d 842. The record fully authorizes the trial court's finding and conclusion. It is therefore the opinion of this Court that there has been no abuse of discretion and that the judgment of the trial court on the first motion should be affirmed.

In the second and third motions Richardson makes the bare assertion that he is moving under CR 60.02 and states not a single fact upon which he may base his right to use the rule for relief. Facts are stated which may have been quite pertinent to a defense of the original action but none are asserted either in the motion or by supporting affidavit to show why he was prevented from asserting those facts in the original action. In other words there is nothing in either of the motions which tends to explain the default. In Dant v. Progress Paint Mfg. Co., Ky., 309 S. W. 2d 1

we explicitly held that, under those conditions, the moving party is presumed to have no explanation. The showings made in the second and third motions are wholly insufficient and the trial court was correct in denying the relief sought.

For the reasons stated each of the three orders of the trial court are affirmed.

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APPENDIX II.

COURT OF APPEALS OF KENTUCKY

OCTOBER 23, 1959

RALPH RICHARDSON, - - - - - - *Appellant.*

v.

C. C. BRUNNER, - - - - - - - *Appellee.*

Appeal from Jefferson Circuit Court,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING.

The appeal now before us grows out of a fourth attempt by motion to vacate a default judgment, pursuant to CR 55.02 and CR 60.02(4), on the ground that it was void ab initio. This appeal was taken from the order overruling the motion. The judgment was rendered on October 22, 1956, against appellant, Ralph Richardson, in favor of appellee, C. C. Brunner, in the Jefferson Circuit Court. It vested Brunner with fee simple title to certain real estate in Louisville which Richardson claimed he owned.

The other three motions which sought the same relief on the same ground were overruled and, on an appeal to this Court from the order entered, were all dealt with in an opinion styled Richardson v. Brunner, Ky., 327 S. W. 2d 572. The facts are fully set forth in the opinion and

we shall not repeat them. We there held that the three motions were properly overruled.

Although the above opinion does not specifically state that the judgment rendered in the original action was a valid one, such a determination in this respect may be plainly inferred from the refusal of this Court to uphold any of appellant's contentions on the former appeal, with the result that the judgment was left undisturbed. However, in order to dispel any doubt that may now exist on this point, we unequivocally hold the judgment must stand as entered in the lower court.

The instant motion undertakes to relitigate, as did the other three motions, the same issue between the same parties as regards the same subject matter, namely, that the judgment is a nullity so that Richardson still owns the property, but it is our view this issue has been finally and conclusively adjudicated. In other words, the doctrine of res judicata applies and bars any further litigation of this issue.

Wherefore, the judgment is affirmed.

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APPENDIX III.

CONSTITUTIONS—STATUTES—RULES OF CIVIL PROCEDURES INVOLVED.

Paragraph 1 of Article 14 (Fourteenth Amendment of the Constitution of the United States) reads in part as follows:

> "• • • Nor shall any state deprive any person • • • of property without due process of law."

Sub. (1) and Sub. (6) of paragraph (b) of Rule 12 of the Federal Rules of Civil Procedure, 28 U. S. C. A. p. 335, 1950 Edition, reads as follows:

> "(1) Lack of jurisdiction over the subject matter • • •.
>
> "(6) Failure to state a claim upon which relief can be granted • • •."

and paragraph (h) of Rule 12 of the Federal Rules of Civil Procedure U. S. C. A., p. 336, 1950 edition, reads in part as follows:

> "(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, • • •."

28 U. S. C. A. Federal Rules of Civil Procedure, subparagraph (c) of paragraph 2 of Rule 55, page 147, 1950 edition, reads as follows:

> "(c) Setting aside default. For good cause shown the Court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

And Sub. (1), Sub. (3), Sub. (4), and Sub. (6) of Subparagraph (b) of Rule 60 of the Federal Rules of Civil Procedure, U. S. C. A. page 310, 1950 edition, reads in part, as follows:

> "• • • (1) • • • or excusable neglect; • • • (3) • • • or other misconduct of an adverse party; (4) the judgment is void; • • • (6) any other reason justifying relief from the operation of the judgment. • • •"

Paragraph (3) of Section 1257 of the U. S. C. A. Judiciary and Judicial Procedure, page 88, 1949 edition, reads as follows:

> "(3) By writ of certiorari, • • • the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, • • • the United States, or where any title, right, • • • is specially set up or claimed under the Constitution • • •"

Section two of the Constitution of the State of Kentucky, is, in part:

> "Absolute and arbitrary power over • • • property of Freeman exists nowhere in a Republic, not even in the largest majority."

Section One Hundred and Nine of Kentucky's Constitution is, in part:

> "The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in • • • one Supreme Court (to be styled The Court of Appeals.)and the courts established by the Constitution." Kentucky Revised Statutes, 1953 Edition, pages 38, 54.

Section 91.470 of the Kentucky Revised Statutes 1953 edition, page 691, published by the Kentucky Statute Revision Commission reads as follows:

"91.470 (3001) Sale of Personal Property for City Taxes.

"(1) Except as provided in KRS 91.550, the Tax Receiver shall, immediately upon the filing of the lists of unpaid tax bills, distrain the personal property owned or in the rightful possession of the taxpayer, notwithstanding the existence of any lien, except the lien for State taxes, upon the property, and may proceed to sell the title of the taxpayer in a sufficient amount of the property to pay the tax, penalties, interest and costs."

Section 91.480 of the Kentucky Revised Statutes, 1953 edition, page 692, published by the Kentucky Statute Revision Commission, reads as follows:

"(91.480 (3001; 3003)) Sale of Real property for City Taxes.

"(1) If no personal property is reasonably available out of which the tax bill can be collected by distraint, the Tax Receiver shall sell, for cash, a sufficient amount of the real property belonging to the taxpayer to pay the tax, penalties, interest and costs, subject to the provisions of KRS 91.550. The sale shall be at public auction, in the same manner that property is sold under Execution, except that the sale shall be had at the door of the City Hall of the city in which the land lies, and the land need not be appraised or levied on. The sale shall be advertised by posting for fifteen days before the sale a written or printed notice at the City Hall door, and by publication at least four weeks prior to the day of sale by one insertion in a newspaper published in the English language in the city.

"(2) The tax receiver shall, not less than fifteen days before the sale, mail to the taxpayer a postal card addressed to his residence or place of business, if it can be ascertained, notifying him of the time and place of the sale. In order to cover the cost of the advertisement and notification, the tax receiver shall collect a fee of two dollars from each person whose property is

advertised, and shall pay the fee into the City Treasury. In no event shall the City pay the fee.

"(3) The failure of the Tax Receiver to send or of the taxpayer to receive the notice of sale required by sub-section (2) of this section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both."

Section 91.540 of the Kentucky Revised Statutes, 1953 edition, page 693, by the Kentucky Statute Revision Commission reads as follows:

"91.540 (3004) Deed to purchaser at tax sale; effect as evidence.

"If real property is not redeemed within the time allowed for redemption, a fee simple title shall vest absolutely in the purchaser, subject only to state taxes, and the Tax Receiver shall thereupon convey the property by deed to the purchaser. The purchaser shall then be entitled to possession of the property, and may recover it by action or motion. * * * The deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed."

Section 411.120 of the Kentucky Revised Statutes, 1953 edition, page 2939, published by the Kentucky Statute Revision Commission, reads in part as follows:

"411.120 (11) Action to quiet title; court order of title proved.

"Any person having both the legal title and *possession of land may* prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. * * *."

CR 1 of the Kentucky Rules of Civil Procedure, page 1, 1st official edition, July 1953, reads in part as follows:

> "CR 1. SCOPE OF RULES. These rules govern the procedure and practice in all courts of this State, * * * with the exception that they do not govern procedure and practice in any special statutory proceeding * * *."

Rule 12.02 pages 19-20 First Official Edition, July 1953, of the Kentucky Rules of Civil Procedure reads in part as follows:

> "CR 12.02. HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * * (6) failure to state a claim upon which relief can be granted, * * *."

CR 55.02 of the Kentucky Rules of Civil Procedure reads, page 83, 1st official edition, July 1953, in part as follows:

> "CR 55.02. SETTING ASIDE DEFAULT. For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

Rule 60.02 of the Kentucky Rules of Civil Procedure reads, page 89, 1st official edition, July 1953, in part as follows:

> "CR 60.02. MISTAKE; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) * * * or excusable neglect; (3) * * * misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; * * * (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment * * *."

APPENDIX IV.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, DIVISION

C. C. BRUNNER, - - - - - - - - *Plaintiff,*

v.

RALPH RICHARDSON,
621 S. 13th Street,
M. KAUFMAN, (W.O.)
212 Main Street,
Little Rock, Arkansas,
and
FANNIE KAUFMAN, (W.O.)
212 Main Street,
Little Rock, Arkansas, - - - - *Defendants.*

COMPLAINT.

Comes the plaintiff, C. C. Brunner, and states that he is the record title owner of the hereinafter described property in Louisville, Kentucky:

Beginning at the North West corner of 7th and Cedar Streets; thence North with the West line of 7th street 70 feet; thence West and parallel with Cedar Street 55 feet 8 inches; thence South and parallel with 7th street 2 feet; thence West and parallel with Cedar street 56 feet 10 inches, more or less, to the East line of the lot conveyed to James Lewers and wife by deed dated April 15, 1847 and recorded in Deed Book 68, Page 70, in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky; thence South with said line 68 feet to the North line of Cedar

Street; thence East with the North line of Cedar street 112 feet 6 inches, more or less, to the point of beginning.

Being the same property conveyed to C. C. Brunner by deeds dated December 8th 1952 by Vernon H. Wetherby, Tax Receiver of the City of Louisville, and recorded in Deed Book 2968, Page 93, Deed Book 2968, Page 112, and Deed Book 2968, Page 117.

Plaintiff states that Ralph Richardson is made a party hereto to assert any claim or interest in the above described property that he may have by reason of a deed to him dated August 12, 1946 and recorded in Deed Book 2154 Page 570 in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky.

Plaintiff says that his rights are affected, and that an actual controversy exists with respect to his rights, under KRS 91.540; that the plaintiff contends that he is the fee-simple owner of the heretobefore deseribed property and that he is entitled to the immediate possession of the said property, and that he is entitled to a declaration of his rights by this Court.

Plaintiff states that there is a mortgage against the said property payable to M. and Fannie Kaufman recorded in Deed Book 2454 page 570 in the office of the Clerk of the Jefferson County Court, Jefferson County Kentucky; that they are made parties to this action to assert any claim that they may have against the said property.

Plaintiff says that the defendants M. Kaufman and Fannie Kaufman are non-residents of this state and that they are absent therefrom; that they are now residents at 212 Main Street, Little Rock, Arkansas, which is the place wherein a post office is maintained nearest to the residence of these defendants.

Wherefore, plaintiff, C. C. Brunner, prays this Court for a declaratory judgment directing the defendant, Ralph Richardson, to release any and all rights or claim that he makes against the property herein; that this plaintiff be declared to be the owner of the fee-simple title thereto; and for warning order attorney be appointed for the defendants Fannie Kaufman and M. Kaufman to notify them of the pendency of this action; and for all other relief to which he may appear entitled.

(s) Josiah B. Gathright,
for
Bell & Gathright,
Counsel for Plaintiff,
608-9 Realty Bldg.,
Clay 4894.

Plaintiff, C. C. Brunner, says that the statements contained in the above complaint are true as he verily believes.

(s) C. C. Brunner
C. C. Brunner.

Subscribed and sworn to before me by C. C. Brunner, this the 20th day of April, 1956. My commission expires 6-7-57.

(s) C. L. Bell,
Notary Public, Jefferson Co., Ky.

APPENDIX V.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. C. BRUNNER, - - - - - - - *Plaintiff.*

v.

RALPH RICHARDSON, ET AL., - - - *Defendants.*

JUDGMENT.

The defendant, Ralph Richardson, having been duly summoned and having failed to appear or to make a defense, it is ordered that judgment be entered for the plaintiff, C. C. Brunner, against the defendant, Ralph Richardson, for the title to the following described property which was demanded in the complaint of the plaintiff:

> Beginning at the North West corner of 7th and Cedar Streets; thence North with the West line of 7th street 70 feet; thence West and parallel with Cedar Street 55 feet 8 inches; thence South and parallel with 7th Street 2 feet; thence West and parallel with Cedar Street 56 feet 10 inches, more or less, to the East line of the lot conveyed to James Lawers and wife by deed dated April 15, 1947 and recorded in Deed Book 68 Page 70, in the office of Clerk of the Jefferson County Court, Jefferson County, Kentucky; thence South with said line 68 feet to the North line of Cedar Street; thence East with the North line of Cedar Street 112 feet 6 inches, more or less, to the point of beginning.
>
> Being the same property conveyed to C. C. Brunner by deeds dated December 8th, 1952, by Vernon B. Wetherby, Tax Receiver of the City of Louisville, and

recorded in Deed Book 2968 Page 93, Deed Book 2968 Page 112 and Deed Book 2968 Page 117.

and the absolute fee-simple title to the said property as to the said defendant above named is in the plaintiff, C. C. Brunner, and adjudged free of any claim of said defendant. Plaintiff to pay costs including $6.00 Commissioner's Fee.

(s) Macauley L. Smith,
Judge.

Entered Oct. 22, 1956.

APPENDIX VI(a).

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. C. BRUNNER, - - - - - - - - *Plaintiff.*

v.

RALPH RICHARDSON, - - - - - - - - *Defendant.*

MOTION.

Comes defendant, Ralph Richardson, and moves the Court, under CR 55.02 and 60.02(4), to set aside and hold for naught the default judgment entered herein on October 22, 1956, on the ground that said judgment is void. Although the Court had jurisdiction (1) of the person of the defendant, and (2) of the subject matter; (3) there was and is a "want of power" in the Court "to grant the relief attempted to be granted" in this judgment. Lortan, et al. v. Ashbrook, et al., 220 Ky. 830, 295 S. W. 1027. In other words, the default judgment is void because the Court lacked—did not have jurisdiction—the power to decree a deed valid which is and was void ab initio.

The complaint is insufficient to sustain a default judgment decreeing title in the plaintiff, because (1) it fails to state that tax receiver distrained and sold, or attempted to distrain or sell, in compliance with the mandatory provisions of KRS 91.470, any personal property, (2) it fails to allege that the tax receiver, in compliance with the plain provisions of KRS 91.480 sold only a sufficient amount of real estate "belonging to the taxpayer to pa the tax, penalties, interest and costs"; (3) it fails to alle e that the

tax receiver advertised the sale by written or printed notice by posting same for 15 days before the sale at the City Hall door; (4) it fails to allege that said tax receiver advertised said sale by publication at least four weeks prior to the day of the sale by one insertion in a newspaper published in the English language in the city; (5) it fails to allege that the sale was at public auction; (6) and it fails to allege that the tax receiver mailed a notice of the sale to the taxpayer, the defendant. In order for the Court to render a valid judgment in this character of case, not only must the plaintiff allege all the facts above set out, but he must prove them. Lowther v. Moss, 239 Ky. 290, 39 S. W. 2d 501; Soper, et al. v. Foster, et al., 244 Ky. 658, 51 S. W. 2d 927; Wagner v. Peoples Bldg. and Loan Assn., 292 Ky. 671, 167 S. W. 2d 825.

"A judgment is void when the Court proceeds without authority and in a manner forbidden by law with respect to the matter being adjudicated, although it may have jurisdiction of the parties and of the subject matter". Wagner v. Peoples Building & Loan Assn., supra. The Court here in the case at bar proceeded without authority to declare valid, deeds void ab initio.

KRS 91.540 is a drastic statute. It is, in reality, in its very essence and nature confiscatory and to avoid the contravention of the fifth and fourteenth amendments of the Constitution of the United States forbidding the taking of one's property without due process of law, both the pleadings and evidence in such a case must clearly and definitely establish that all the mandatory statutory provisions in respect to the tax sale have been complied with. Chaney, et al. v. Commonwealth, 314 Ky. 279, 234 S. W. 2d 960. Hence, since all the mandatory provisions of KRS 91.470 and KRS 91.480, hereinabove set forth, were neither pled nor proven, the default judgment herein is void, because it takes defendant's property without due process of law.

Defendant files herewith in support of said motion his affidavit.

(s) Frank E. Haddad, Jr.,
Frank E. Haddad, Jr.,

(s) H. E. Rose,
H. E. Rose,

(s) Robert Hubbard,
Robert Hubbard,
Attorneys for Defendant,
Kentucky Home Life Building.

APPENDIX VI(b).

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. C. BRUNNER, - - - - - - - - *Plaintiff.*

v.

RALPH RICHARDSON, ET AL., - - - - *Defendants.*

ORDER.

This cause coming on to be heard on Defendant's motion, supported by his affidavit, under CR 55.02 and CR 60.02(4), and the Court being advised, overruled said motion, to which ruling of the Court the defendant objects on the ground that plaintiff's complaint is fatally defective in that it fails to allege that the city tax receiver complied in the sale of the tax bills with each and every mandatory provision of Sections KRS 91.470 and KRS 91.480, namely; (1) that said tax receiver distrained or attempted to distrain available personal property of the defendant; (2) that he did not sell any more real estate than necessary to pay said tax bills; (3) that he held an auction; (4) that he advertised the sale by written or printed notice, posting same for 15 days before the sale at the City Hall door; (5) that said tax receiver advertised said sale by publication at least 4 weeks prior to the day of the sale by one insertion in a newspaper published in the English language in the city; (6) that the tax receiver mailed a notice of the sale to the tax payer, the defendant; and further objects on the ground that without such allega-

tions in the complaint, it does not give the Court jurisdiction of the subject matter to render the default judgment rendered, and that said default judgment is void, and on the further ground that without said allegations and proof thereof said default judgment is the taking of defendant's property without due process of law in contravention of the Fifth and Fourteenth Amendments of the Constitution of the United States.

(s) Smith,
Judge.

(s) Entered April 14, 1959.

April 14, 1959.

Copy Received.

(s) Josiah B. Gathright.

(s) Frank E. Haddad, Jr.,
(s) H. E. Rose,
(s) Robert Hubbard,
Attorneys for Defendant.

FILED
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 585

RALPH RICHARDSON, Petitioner,

versus

C. C. BRUNNER, Respondent.

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

THOMAS ELLIS LODGE

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 585

RALPH RICHARDSON, - - - - - *Petitioner,*

v.

C. C. BRUNNER, - - - - - - *Respondent.*

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

HISTORICAL STATEMENT.

The petitioner, through his counsel tries to favorably impress this Honorable Court, by placing a great deal of stress upon the ignorance, poverty and misguidance of the defendant, Ralph Richardson, as grounds for obtaining the Writ prayed herein. They also charge that counsel for C. C. Brunner made misleading statements to the petitioner, but upon examination of the record in the case we find that the petitioner was not ignorant, poverty stricken or misguided, but a selfish imposing individual, who thought only of himself, and his wilful delay and negligence has been the sole cause of his difficulties and the loss of his property through tax sales to secure the payment of taxes and penalties.

This petitioner may be void of book knowledge, but he certainly knew enough to collect his rents and spend the money and permit others to pay his taxes. He knew that he owned real property from which he collected monthly rentals and that he owed City taxes as well as State and County taxes, yet he permitted his tax bills to accumulate and to become delinquent for the year 1950, at which times his property was duly advertised for sale pursuant to law in the daily papers and posted *in the City Hall* as required by Statute.

He failed to appear and pay his tax in due time and at the time and place designated in the notice of sale a tax bill for the year 1950, his tax bill against the property herein, was sold to the respondent C. C. Brunner.

He received additional tax bills for the year 1951 and 1952 but he still failed to pay his tax or redeem his property but collected his rents and permitted this respondent to pay his taxes for the additional two years, during which period he had the privilege of paying the delinquent tax with interest and penalties, but still he elected to let this respondent pay the tax while he collected the rent and spent it for his own use and benefit.

For further evidence of the insincerity of petitioner's claim that he was prevented from paying his tax, and redeeming his property by the exorbitant price and strict demands of this respondent's counsel, and that he attempted to pay his taxes before expiration of redemption period, and that he was denied due process of law, falls flat because he would not have had to come

to respondent if he had sought in good faith to redeem his property within the time allowed by law, for that is done in the office of the Tax Receiver and the purchaser has no choice in the matter, but to receive his refund plus interest and penalties.

KRS 91.510. Redemption of Real Property Sold at Tax Sale.

"(1) The owner of any real property sold for city taxes, or his heirs, or representatives, shall have the same right to redeem such property from the purchaser thereof as is provided by law in the case of real property sold under execution, by paying to the tax Receiver the amount of the purchase price at the sale, with interest thereon at the rate of 1% per month, or fraction thereof, from the date of sale, and in case the land is not redeemed before April 1 next succeeding the sale, by paying a further penalty of 5% upon the purchase price. In the case of an adult owner the redemption must be made within two years from the date of sale, and in the case of an infant owner it must be made within one year after he becomes of age. . . . .

"(2) All money paid in redemption of real property sold for city taxes shall be paid to the *Tax Receiver who shall account for the money in the same manner and to the same officer as in the case of regular tax collections. . . . The tax Receiver shall pay over to the purchaser upon proper receipt, the amount of the purchase price with interest and penalties thereon.*" (Emphasis supplied.)

This the taxpayer, Ralph Richardson, the petitioner herein, neglected to do; thus the Court can readily see from the law herein, that the petitioner is not sincere when he claims that he was prevented by the exorbitant demands of counsel for respondent, from redeeming his property within the time allowed by law, thereby denying him due process thereof.

The petitioner not only failed to redeem his property before the expiration date for redemption, but failed to make any effort to effect a settlement for more than three years after the expiration date and would no doubt be delinquent to this day if action had not been taken.

After suit was filed and defendant having been duly served and process returned by the Sheriff and 20 days having expired as required by the rule CR 12.01, counsel for plaintiff filed several pleadings in the case and mailed copies to the defendant with full postage affixed thereto and none were returned, but still no defense was made by the defendant or any settlement attempted although suit was filed and service made. Finally after several days of delay counsel for plaintiff, C. C. Brunner filed motion for judgment and mailed copy postage paid, to defendant and upon the failure of defendant to answer, judgment was rendered in favor of plaintiff, C. C. Brunner on October 22, 1956. See petitioner's petition, Appendix V.

This petitioner had plenty of time to redeem his property if he had not slept upon his rights to redeem before Judgment, pursuant to Kentucky C.R. 12.01

which provides that defendant shall answer summons within 20 days.

This action v. petitioner, Ralph Richardson, was filed in the Jefferson Circuit Court on the 20th day of April 1956, almost four years after date of deed, December 8, 1952 which was executed and delivered to respondent, for copy of Complaint of Respondent. See petitioner's petition, Appendix IV, pages 47, 48 and 49.

Although suit was filed and service had on defendant, Ralph Richardson, he did not answer or make settlement before judgment was entered on October 22, 1956. Petitioner's petition, Appendix V, pages 50-51.

Petitioner states in his petition, page 11, second paragraph, clause (2) "That petitioner tried to redeem his property within the time allowed by law and before his property was conveyed by City Tax Deed". This effort certainly was not in good faith, if it had been petitioner would have been able to redeem the same and Brunner, the respondent, would not have had any choice in the matter, and the Tax Receiver would not have executed the deed to C. C. Brunner.

The first active step taken by petitioner, the defendant in the Court below, was by motion on November 23, 1956 to set aside the judgment entered 32 days before. This judgment is a regular valid judgment, entered properly under the law and is not void "*ab initio*" as contended by the petitioner. The only question here is, whether or not the judgment is authorized by statutory provisions.

CHAPTER 91 OF KENTUCKY REVISED STATUTES.

Pursuant to the powers vested in it by Section 29 of the Constitution of the Commonwealth of Kentucky, the Legislature has enacted into law Chapter 91 of the Kentucky Revised Statutes, which is entitled:

FINANCE AND REVENUE OF CITIES OF THE FIRST CLASS.

SECTION 181 OF THE CONSTITUTION.

Louisville is a City of the First Class and is subject to and is governed by these Statutes, duly enacted by the General Assembly of the Commonwealth of Kentucky, all of which laws are now and have always been in full force and effect since the enactment of Chapter 91 of the Kentucky Revised Statutes as provided in Section 181 of the Constitution of Kentucky.

The validity of these Statutes has never been questioned, so it must now be admitted that it is the *Law of Finance and Revenue* for Cities of the First Class. Louisville being a City of the First Class, it is the law now in force therein.

The people through their duly elected Representatives have spoken and KRS Sections 91.010 to 91.990 is the *Law* providing for the *Finance and Revenue of Cities of the First Class* and will remain the Law until *Repealed, Amended* or *declared* to be in *conflict* with the *Constitution of the State of Kentucky* or of the *Constitution of the United States.*

CONSTITUTIONALITY NOT QUESTIONED.

The constitutionality of this law has never been attacked by the taxpayer, and now stands within the Statutes *INVIOLATE*. For those who wish to attack the validity of this or any other Act of the Legislature, we call the Court's attention to the case of Johnson, Governor, Commonwealth ex rel, Meredith, Attorney General, in which the Court said:

> "Be that as it may, it is a principal, basic in its recognition and fundamental to the co-ordination of the two divisions of governmental power, that the courts do not concern themselves with the wisdom, need or appropriateness of legislation, nor the purposes motivating it. That is left where it is put by the constitution—in the General Assembly, subject only to the veto power of the Governor. Section 26 of the Constitution declares that all laws 'Contrary to this Constitution shall be void.' Our functions are to determine the constitutional validity and to declare the meaning of what the legislative department have done. We have no other concern.
>
> "And we have been sensitive to the rule that an Act should be held valid unless it clearly offends the limitations and prohibitions of the constitution, within which is everything contrary to the policies and genius of our form of government. So, always a burden is upon one who questions the validity of an act to sustain his contention." Johnson, Governor, Commonwealth, ex rel. Meredith, Attorney General, 291 Ky. 829, 165 S. W. 2d 820.

JURISDICTION.

There is certainly no question about the jurisdiction of the trial Court below over the subject matter and the parties involved. The defendant was duly served to answer a properly prepared complaint as required by Rule C.R. 12.01 of the Civil Rules of Procedures, and upon his failure to answer and make defense, judgment was properly entered in accordance to the pleadings filed in this action.

This judgment has been repeatedly upheld by the Court of Appeals of the Commonwealth of Kentucky, and held to be clearly within the *jurisdiction* and *Discretion* of the *trial Court*, and not void *"ab initio"* as contended by petitioner.

Respondent insists that no constitutional questions have been raised in this Court and especially in the Court below. There has never at any time been any question raised in the trial Court before judgment as to the constitutionality of the Statute under which this action was instituted. Petitioner's claim is based entirely upon one section of the same statute upon which respondent relies, yet the constitutionality of that section has not been questioned in the state Court and respondent insists that, petitioner, the defendant in the trial Court, wilfully slept upon his rights after due and timely notice permitting a default judgment to be entered against him.

Section 2, of the constitution of Kentucky has no bearing upon this cause, no Court or any individual

has exercised or attempted to exercise absolute or arbitrary power over petitioner or his property. He was given every possible opportunity to come into Court and assert his rights if any he had and he failed and neglected to do so.

Section 109 of the Constitution of Kentucky has no significance because the one supreme court (to be styled the Court of Appeals) has heard and ruled upon this cause 3 times and has rendered the same opinion each time. The entire record from beginning to end shows conclusively that the defendant in the trial Court had every opportunity that could possibly be given to him to answer the complaint and that he was not, under any circumstances, deprived of life, liberty or property without due process of law, as claimed in controvention of the 5th and 14th amendments of the Constitution of the United States.

"Before Supreme Court may review decisions of State Court it must appear affirmatively from the record not only that Federal question was presented to the highest Court of the State having jurisdiction but that its decision of the Federal question was necessary for determination of the case." Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476.

"United States Supreme Court will not decide an issue of constitutionality of state statutes if case may reasonably be decided upon construction of statute under which act is clearly constitutional." Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55, 81 L. Ed. 510.

"Supreme Court would not pass on constitutional question not shown by record to have been raised in state court, whether or not it arose under a different or the same constitutional clause with respect to which other questions were properly presented." People of State of New York, ex rel. Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666.

"An objection not taken at the trial and therefore not open in the state supreme Court cannot be considered in the United States Supreme Court." Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123.

"The Federal right must have been set up and adjudicated against the claimant by the judgment of the State Court." Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127.

"Writ of Certiorari will be dismissed where record fails to disclose that complaining party definitely raised Federal question in State Court." Missouri Pac. R. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235.

"Question not presented to or passed upon by State Court cannot form basis for Writ of Error." Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245.

"A constitutional question not shown by the record to have been presented to and determined by the State Court will not be considered." White River Lbr. Co. v. Arkansas ex rel. Applegate, 279 U. S. 692, 75 L. Ed. 903.

KRS 91.480 and 91.540 are valid statutes of the Commonwealth of Kentucky and have never been questioned or attacked by this petitioner or any one else as to their constitutionality and for this and other valid reasons, respondent contends that this Court has no

jurisdiction over the subject matter as presented in this action; Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476. Thompson v. Consolidated Utilities Corp., 300 U. S. 55, 81 L. Ed. 510. People of State of New York Ex rel. Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666, Ireland v. Woods, 246 U. S. 323, 62 L. Ed. 745, Live Oak Water Users Assn. v. Railroad Commissioner, 269 U. S. 354, 70 L. Ed. 305.

When the jurisdiction is founded upon the subject matter alone, the case must be one arising under the Federal Constitution or laws involving a Federal question. Nashville C. and St. L. R. Co. v. Taylor (CC Tenn.), 86 Fed. 168.

Necessity of raising Federal question in State Court. Empire State-Idaho Min. & Dev. Co. v. Hanley, 198 U. S. 292, 49 L. Ed. 1056, Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123, Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127, Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U. S. 341, 64 L. Ed. 601, Missouri Pac. R. Co. v. Hannah, 266 U. S. 184, 69 L. Ed. 235.

Supreme Court has no jurisdiction where alleged unconstitutionality was not raised below, New York ex rel. Rosevale Realty Co. v. Kleinert, 268 U. S. 646, 69 L. Ed. 1135, Mellon v. O'Neil, 275 U. S. 212, 72 L. Ed. 245. White River Lumber Co. v. Arkansas, ex rel. Applegate, 279 U. S. 692, 73 L. Ed. 903.

Petitioner has not raised any constitutional question, he merely contends that the judgment of the trial Court is void *"ab initio"* because he alone considers the statute invalid, not having attacked the constitution-

ality of statute in the Court and no opinion on the question having been rendered on that point he has no authority to assume that the statute is invalid. Van Huffel v. Harkleroad, 284 U. S. 225, 76 L. Ed. 256. Aero Mayflower Transit Co. v. Georgia PS-Commn, 295 U. S. 285, 79 L. Ed. 1439. Henderson v. Georgia, 295 U. S. 441, 79 L. Ed. 1530. Pennsylvania R. Co. v. Illinois Brick Co., 297 U. S. 447, 80 L. Ed. 796, Jackson v. State, 280 S. W. 202, 103 Texas 318.

FOR THE REASONS STATED RESPONDENT INSISTS

No Federal question has been raised in this action by petitioner. All his objections have been mere assertions of a Federal right which is no grounds for invoking the jurisdiction of the Supreme Court. Bowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141, Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 62 L. Ed. 221.

There is no violation of Sections 2 and 109 of the Constitution of Kentucky in the prosecution of this cause. Every step taken and every order, judgment and opinion entered therein has been in regular order and authorized by rules of statute.

THE STATUTE UNDER WHICH THIS QUESTION IS BASED IS VALID AND SUPPORTED BY SECTIONS 2 AND 109 OF THE STATE CONSTITUTION.

Johnson v. Fordson Coal Co., 213 Ky. 445, 281 S. W. 472. L. & N. R. R. Co. v. Greenbrier Distilling Co., 107 Ky. 775, 187 S. W. 296. L. & N. v. Siler, 186 F. 176. L. & N. R .R. Co. v. Garrett, 231 U. S. 298.

RESPONDENT'S ANSWER TO

Petitioner's prayer for writ of certiorari in the order of his prayer and brief filed herein;

1. Petitioner's prayer on page 1 of his petition is insufficient because it fails to state the nature of the four (4) final orders overruling motions to set aside judgment and the two (2) opinions and or decisions of the Court of Appeals, which affirmed the judgment of the lower Court each time.

CITATIONS RECITED ON PAGE 2 OF BRIEF.

1. The citation of the opinions of the Court of Appeals rendered in this case are correct and respondent relies thereon for his defense to petitioner's motion and refers to Appendix I and II of petitioner's brief as a part of his answer.

2. Further as to jurisdiction of this Court respondent refers the Court to his previous comment on jurisdiction recited on page 8 of this response hereto and the citation of authorities therein.

PETITIONER UNDER STATEMENT OF MATERIAL FACTS, PAGES 5 TO 14, INCLUSIVE.

Petitioner just assumes the Tax Receiver failed to comply with the statutory provisions in the sale of the property at the Tax Sale. No proof was taken in this action and the tax deed is prima facie evidence that the law was fully complied with KRS 91.540—"The deed shall be prima facie evidence on the regularity of the sale, of all prior proceedings and of title in the purchaser to whom the deed is executed."

LIFE HISTORY OF PETITIONER DOES NOT PRESENT A FEDERAL QUESTION.

1. The recitation of the biography of petitioner as related by his counsel, is not germane to the subject and has no bearing on the validity of the judgment rendered in the lower Court or the opinion of the Court of Appeals of Kentucky. None of the objections relied upon by the petitioner for his defense in the Court of Appeals or in this Honorable Court were in the record of trial Court before judgment.

Petitioner's life History, his place of birth, conversations with plaintiff's attorney, affidavit of petitioner's counsel as shown on pages 5 to 14 inclusive of petitioner's petition fail utterly to establish any Federal question or that petitioner has been denied due process of the law.

2. This Court has the record before it and the Statute under which this action was prosecuted and can

readily see that the pleadings throughout, corresponds to the rules and the Statute, and in keeping with the opinion of the Court of Appeals of Kentucky in all the cases of Richardson v. Brunner, 327 S. W. 2d 572, and Richardson v. Brunner, 328 S. W. 2d 530. The subject matter and not the parties is the test of the jurisdiction of the Court. 54 Am. Jur., Sec. 21, page 679.

3. A Federal question does not exist where the only act of the defendant complained of is the institution of an orderly proceeding in the Court or by reason of the fact that the case involves the enforcement of the full faith and credit clause, since the cause establishes a rule of evidence rather than of jurisdiction. Cases arising under the law of the United States are such as grow out of the legislation, whether they constitute the right, privilege, claim, protection or defense of the party in whole or in part by whom they are asserted. 54 Am. Jur. 45, page 701—also see Des Moines v. Des Moines City R. Co., 214 U. S. 179, 317 U. S. 678-87 L. Ed. 544, rehearing denied 317 U. S. 710, 87 L. Ed. 566. Respondent calls the Court's attention to Sec. 50, Am. Jur. page 705 and notes 7-8-9, Quote: Sec. 51, Am. Jur. page 706—Notes; Sec. 52 Am. Jur. page 707 Notes and especially Sec. 53, Am. Jur. 54 pages 707-8 and notes thereto.

See about Bond 54 Am. Jur., Sec. 210, page 843, Rule 36.

Briefs etc. 54 Am. Jur., Sec. 211, page 843.

Question not raised in trial Court. 54 Am. Jur., Secs. 216-217.

QUESTIONS BEFORE THE COURT.

The validity of this Statute that governs this petition is not before the Court and was not before the trial Court below and for that reason the trial Court was justified in the rendition of the judgment entered in this case.

Chapter 91 of the Kentucky Revised Statutes in many of its numerous sections provide means of control over the finance and revenue department of Louisville, a City of the First Class, all of which sections are still a valid part of the Statutes under which the City levies and collects its taxes or revenue to finance the various departments of the City Government.

The Legislative Department when enacting this Statute, knowing the frailties of the human mind in construing the law, very definitely instilled into these Statutes various savings clauses so that no one, even the wayfarer, should error therein.

KRS SECTION 91.280 PROVIDING FOR GENERAL AND SPECIAL TAX LEVIES THE LEGISLATURE IN SUBSECTION 3 THEREOF ENACTED THIS SAVINGS CLAUSE:

"If in any year the Board of Aldermen fail to pass a levy ordinance or ordinances, or if the levy ordinance or ordinances is or are invalid or inoperative, the rate of taxation for that fiscal year shall be the same as for the year before, item for item."

KRS 91.340. Assessor to View Property Before Assessing It:

"Failure to comply with this section shall not invalidate the assessment."

KRS Section 91.360 Referring to Designation of Real Property: Errors and Omissions the Legislature in Sub-section 4 of Said Statutes Enacted This Savings Clause:

"No mistake in, or omission of, the correct name of owner or holder of taxable land or improvements shall impair the assessment, if the lands or improvements are designated in the assessment books by the number and block assigned to them or the assessor's map, or otherwise fully identified in the assessment book."

KRS 91.140 Effect of Failure to Elect Board to Act; Taxpayers' Complaint and Remedy:

"If in any year a Board of Equalization is not legally elected, or fails to meet, or fails to perform any essential act, or if, in any year, the assessment books do not remain open for the requisite time, the tax bills shall not thereby become void."

KRS 91.420 Tax Bills, How Made Out and Listed for Collection; Evidence of Validity of Tax:

"Any tax bill so listed with the tax receiver shall be prima facie proof that all steps have been taken to make it a binding tax bill for the amount and purposes and against the person and property therein named or described."

KRS 91.450 TAX NOTICE:

"The failure of the Tax Receiver to send tax notice, or the taxpayer to receive it, shall not invalidate the tax, or the interest or penalties provided for by KRS 91.430."

KRS 91.460 REPORT OF UNPAID TAX BILLS:

"A false report or failure to report shall not invalidate subsequent proceeding for collection of the tax."

KRS 91.480 SALE OF REAL PROPERTY FOR TAXES. SUB-SECTION 3 OF THIS SECTION PROVIDES:

"The failure of the Tax Receiver to send or the taxpayer to receive the notice of sale required by Sub-Section 2 of this Section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both."

SO PLAIN THAT A CHILD CAN UNDERSTAND.

The foregoing savings clauses enacted by the Legislature in the various Sections of this Statute are so positive and plainly worded that even a child could understand and determine the intent of the Legislature when enacting Chapter 91 of Kentucky Revised Statutes containing the law governing the City of Louisville, a City of the First Class. The Legislature certainly intended when it enacted KRS 91.480 that the sale of real property for taxes should not be invalidated because of the failure to make a levy or at-

tempted levy upon personal property before making the sale.

As heretofore stated, we insist that only the Legislative Department has authority to make, repeal, alter or in any manner change the laws of this Commonwealth. This Honorable Court has no constitutional power or authority to add to or take from a law when enacted by the legislative body of this Commonwealth or of the Congress of the United States.

In the case of *Adams Express Company* v. *Young*, 184 Ky. 49, 211 S. W. 407, where it is sought to incriminate the Adams Express Company along with other questions involved in the Local Option laws, it appears that the trial Court exceeded its authority in the application of the law which hinged upon the fact that the Legislature in enacting the Statutes under which the case was being prosecuted had included minors in the new act and did not include inebriates, and in discussing this question the Court said:

> "Why the legislature included minors in the new act and did not include inebriates is not for us to say. It is the duty of the Court to interpret, not make, laws. The power to legislate is delegated to the legislative department. Const. Sections 27 and 28."

In further discussing the validity of the enactment of this Chapter and the various Sections thereof, we desire at this time to call the Court's attention to KRS 91.480, which provides for the sale of real estate when no personal property is reasonably available, and

among other things it provides that the property be sold at public auction. This provision is in Sub-Section 1 of the Statute; but the Legislature in its discretion also provides a savings clause in Sub-Section 3 thereof which specifically and particularly takes care of all the general requirements in KRS Section 91.450, 91.470 and 91.480, Sub-Sections 1 and 2 in the following language, to-wit:

> "THE FAILURE OF THE TAX RECEIVER TO SEND OR OF THE TAXPAYER TO RECEIVE THE NOTICE OF SALE REQUIRED BY SUB-SECTION (2) OF THIS SECTION SHALL NOT INVALIDATE THE SALE OR ANY SUBSEQUENT PROCEEDINGS THEREUNDER, AND NO LEVY OR ATTEMPTED LEVY UPON PERSONAL PROPERTY SHALL BE NECESSARY TO VALIDATE ANY SALE OF REAL PROPERTY, WHETHER FOR TAXES ON REAL PROPERTY, PERSONAL PROPERTY OR BOTH."

One of our Chancery Judges, when sitting as Judge in another case involving the validity of this Section of the Statute, held as follows, after reading and pondering over the wording of the Statute and the statements contained in Sub-Section 3 thereof, said:

"I believe the Statute means just what it says."

ADDITIONAL POINTS AND AUTHORITIES.

The Court of Appeals of Kentucky in the further discussion of Constitutional questions involved in tax legislation has ably said in the case of *Roscoe R. Dalton, Taxpayer* v. *State Property and Building Commission, et al.*, as follows:

> "At the threshold we deem it appropriate to make some preliminary observations. A challenge of the sufficiency of a law under constitutional provisions is not a technical objection to be treated lightly by the Courts. Indeed, it is the sworn duty of the court to enforce provisions of the Constitution irrespective of the consequence. But one of the most firmly established principles of constitutional law, and an oft-repeated mandate of the courts, is that the wisdom of expediency of enactments of the legislature is not for the courts to pass upon. This may be said to have special pertinency in matters of fiscal policies and authority to levy taxes and to appropriate the revenue. Nor are we concerned with the question of whether this project is based upon sound or unsound economic theories or is the best means to achieve the desired results. This is not within the scope of judicial inquiry. So the wisdom of imposing the debt of some hundred million dollars and freezing all or as much as may be required of the highway taxes and revenue for the next thirty years is of no concern whatever to the court. All this was within the legislative responsibility and its power provided it was not restricted by the Constitution. Dalton v. State Property and Building Commission, 304 S. W. 2d 342."

This Court has further held in the case *supra*:

> "In the consideration of the formidable and vital question concerning the meaning and comprehension of 'annual tax' as used in Section 50 of the Constitution in relation to the case at bar, we, of course, recognize the underlying principle that there is a presumption of constitutional validity of a legislative act and the universal rule that a liberal construction is given the constitutional limitations, reasonable doubts being resolved in favor of validity. This judicial position of saving legislation if possible is rooted in the doctrine that a state constitution is not a grant of power but is a limitation on the power of the Legislature and that that department of government possesses and may exercise within constitutional limits all legislative powers as it sees fit. It may enact any law not expressly or impliedly prohibited by the Constitution of the state or the nation."

Further in the same case, we find that the Court further said:

> *"The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows. Indeed, the presumption is that a proviso in a statute refers only to the provision to which it is attached, and, as a general rule, a proviso is deemed to apply only to the immediate preceding clause or provision. It should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matters."* (Emphasis supplied.)

In considering the various Kentucky Stautes governing issues in the case at bar it seems to us, the ~~appellant~~ respondent in this action, that there can be no question as to the intent of the Legislature in the enactment of KRS 91.480, Clause 3, in which the Legislature said in unequivocal terms as follows:

> *"The failure of the tax receiver to send or the taxpayer to receive the notice of sale required by Sub-Section 2 of this Section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both."* (Emphasis supplied.)

We wish to call the Court's attention to a recent decision of the Court of Criminal Appeals of Texas in the case of *A. R. Sheffield* v. *The State of Texas*, 307 S. W. 2d page 100, in which the Court, in passing on the construction of a Statute said as follows:

> *"It is a rule of statutory construction that where two statutes cover the same subject matter, the one general and the other special, the special statute will control, not upon any theory of implied repeal, but upon the broad rule that all parts of the acts or statutes must stand if possible, and that the intention of the legislature is more clearly reflected by the special statute than by the general one. Both are permitted to stand, each applying in its proper place, the special statute being treated as though it were a proviso excepting something from the general one.* Fortinberry v. State, Tex. Com. App., 283 S. W. 146; Hunt v. Atkinson, Tex. Com. App.,

12 S. W. 2d 142, 17 S. W. 2d 780, City of Marshall v. State Bank of Marshall, 60 Tex. Civ. App. 508, 127 S. W. 1083, error refused. Ex parte Townsend, 64 Tex. Cr. R. 350, 144 S. W. 628." (Emphasis supplied.)

In support of the Texas case *supra*, we now call the Court's attention to a recent opinion of Court of Appeals of Kentucky in the case of *Bedinger* v. *Graybill's Executor and Trustee*, 302 S. W. 2d 594, in which this Court has said:

"We revert to our adoption statute. The courts are bound by statutory law as written and cannot write into it an exception which the legislature did not make. Mastin v. McLain, 204 Ky. 504, 264 S. W. 1069; Falls Barach Coal Company v. Proctor Coal Company, 203 Ky. 307, 262 S. W. 300, 37 A. L. R. 1172; Bank of St. Helen v. Mann's Executors, 226 Ky. 381, 11 S. W. 2d 144, 145. *However just and desirable it may sometimes be, the courts may not supply an omission and thereby give force and effect to a statute when applied to a subject about which nothing whatever is said, or when to all appearances it is a condition not in the minds of the legislature at all.* This, of course, is not the same as supplying words where necessary to obviate inconsistency or to complete the sense of a statute. Commonwealth v. Litiginski, 212 Ky. 366, 279 S. W. 339; Barker v. Sterns Coal and Lumber Co., 287 Ky. 340, 152 S. W. 2d 953. Nor may a statute be disregarded or amended for the purpose of preventing an evil consequence that may follow from the only interpretation of which it is susceptible. Thus the court could not hold

that a wife has forfeited her statutory rights as a widow by the fact that she had killed her husband. Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487, L.R.A. 1916 E, 593. So the fact that the adoption statute as it is written opens the door to incongruous use is not reason why or authority for the court interposing an exception or qualification which the legislature did not put into it. It cannot be said, as the appellants contend it should be said, that the adoption for the sole purpose of making an heir is outside the scope of the law." (Emphasis supplied.)

While the foregoing opinion was written in the case *supra* where Robert E. Graybill sought to defeat a clause in his mother's Will which limited his interest in property to himself as long as he lived and then to his heirs, by adopting his wife as his heir, under the Kentucky adoption laws. The opinion of the Court in this case clearly holds that the only duty of the Court is to follow the Statute as written. In the case at bar the Statute is clear and simple and it is the duty of this Court to uphold the Statute unless, that, for some good and sufficient reason the Statute has been declared unconstitutional. None of the statutes referred to as KRS 91.010 *et seq.* has been declared unconstitutional by this Court, or any other Court. The opponents of the foregoing Statute in opposition to the enforcement of the tax laws have used the same argument as was used in the case *supra* by the opponents of the adoption laws which is as follows:

"It is argued by the appellants that the adoption of a wife is void as against public policy.

> Public policy is a vague and indefinite term and is incapable of accurate and precise definition. The public policy of a state is to be found in its constitution and statutes, and it is only in the absence of any expressed or implied declaration in instruments that it may be declared by judicial decisions. *If the legislature has spoken clearly and constitutionally, the courts may not substitute their own ideas of public policy. So what is clearly authorized by a statute cannot be nullified as being against public policy.* True, such policy retains a place in the process of statutory interpretation, and in case of doubtful legislative meaning disregard of such policy will not be attributed to the law making power. Sutherland, Statutory Construction; paragraph 5901, 5902; 50 Am. Jur., Statutes, paragraph 300; Kentucky State Fair Board v. Fowler, 310 Ky. 607, 221 S. W. 2d 425." (Emphasis supplied.)

The principle of law expressed in the foregoing case *supra* is exactly the same as in the case at bar. KRS 91.470 provides for the collection of taxes; that the tax receiver shall restrain the personal property of the taxpayer if any to be found owned or rightfully in the possessions of the taxpayer, to satisfy the taxes, but this section makes no direct provision for the collection of taxes on real property. It apparently referred to and was for the purpose of providing the means for the collection of personal property taxes. The record in this case clearly demonstrates the fact that the taxpayer not only did not have any personal property upon which the tax receiver might levy or distrain, but that he had never listed any personal property for tax pur-

pose as required by law. KRS 91.480 provides the procedure that the tax receiver shall pursue for the collection of taxes due and unpaid upon real property in the City of Louisville and that sub-section 3 of said Statute in no uncertain terms states that:

> "No levy or attempted levy upon personal property shall be necessary to validate any sale of real property whether for taxes on real property, personal property or both."

There can be no doubt in the minds of this Court about the intent of the Legislature in the enactment of this Statute.

We wish to call the Court's attention to a recent decision of the Supreme Court of Arkansas in which that Court was requested to cancel a deed obtained by reason of plaintiff's failure to pay taxes and assessments that had been made against his property.

> "Suit for cancellation of the deed from a drainage district and that plaintiff should be allowed to pay any taxes and assessments found delinquent. Judgment for the plaintiff in the Chancery Court, Miller County, James H. Pilkinton, Chancellor, and the defendant appealed. The Supreme Court, McFaddin, J., held that plaintiff was not entitled to void an improvement district foreclosure sale and effect redemption because not named in the published notice as owner of the land, where it was his own failure to comply with the statute, that prevented him from being listed as the owner." O. P. Leonard, Trustee v. Vance M. Thompson, 306 S. W. 2d 869.

This case is parallel in many respects to the case at bar. If the defendant, Ralph Richardson (now the petitioner), had any right at all he has forfeited same by his failure to list his property and never asserted any claim or interest until after the sale of the tax bill, the payment of taxes for two subsequent years and the issuance by the tax receiver of a deed to the purchaser and not even then until after suit was filed for possession of the property. In further discussing this matter in the case *supra* concerning the publication of notice to the taxpayer, the Supreme Court said:

> "Because the published notice in the foreclosure suit named the Dorsey Land and Lumber Company as the supposed owner, Thompson claimed in the present suit that the entire foreclosure suit of the Drainage District was void and that Thompson still had the right to redeem for the delinquent assessment of 1947, 1948, and subsequent years.
>
> "The Chancery Court agreed with Thompson's contention and allowed him the right of redemption, the effect of which was to require Leonard to receive certain funds and thereby have his title extinguished."

This is almost identical with the situation in the case at bar and it is the argument of appellant that the rule established in the Supreme Court of Arkansas is the natural and general rule of all the appellate courts in this jurisdiction.

The Supreme Court in its further opinion in this case *supra* says as follows:

"In this case the appellee testified he had no actual knowledge of the suit to foreclose, but that he knew the land was in the district and that the taxes had not been paid. We are, therefore, of the opinion that the statute above mentioned relating to the publication of the notice was substantially complied with and that Simpson v. Reiman, *supra, is not controlling here. Appellee's loss is due to his own negligence and he has no just complaint. His land was sold according to law.*" (Emphasis supplied.)

The petitioner, in the case at bar does not anywhere in this record claim that the assessment was void, or that any of the other provisions of the statute were not complied with. His only claim is that the deed is void *ab initio* because the tax receiver of the City of Louisville failed to levy or attempt to levy upon personal property of the taxpayer before sale of the real estate to pay the taxes assessed against him, although he had not listed for taxation any personal property, that would be reasonably available for restraint by the Tax Receiver. In order to satisfy the payment of petitioner's taxes for the years 1950, 1951 and 1952 and no doubt he would have claimed that so much of his personal property as being exempt if any had been found.

IMPORTANT DECISIONS.

We most earnestly call this Court's attention to the opinion rendered by the Court of Appeals of Kentucky some years ago in the case of *Drane* v. *Graves,* 261 Ky. 787, 88 S. W. 2d 927, in which this Court very carefully and fully construes KRS 91.470, 91.480, 91.490, 91.500, 91.510, 91.520, 91.530, and KRS 91.540. This was an action instituted in the Jefferson Circuit Court, Common Pleas Branch, Third Division, and involves all the questions now being adjudicated in this action and very particularly rested upon the validity of a tax deed, such as we have herein, and was continued in the courts for some period of time.

Meanwhile, during this litigation or before, this property had been sold for taxes and been bought by a man by the name of Faust. Proper report had been made of that sale and after the expiration of two (2) years, and no redemption having been made, the Tax Receiver of the City of Louisville, in accordance with the provision of the law, had conveyed the property to Faust, which occurred in 1930. Mrs. Drane, after filing her equity action, purchased this tax title of Faust and was the owner of it at the time she filed her answer in the action filed by Mrs. Graves to collect rent.

The issues having been made for both the plaintiff and defendant upon trial, the Court peremptorily instructed the jury to find for the plaintiff the total amount of rental collected by Mrs. Drane. From that judgment Mrs. Drane appealed. There were several questions involved in this action such as the right for

damages for trespass, ownership of the property under a tax deed and other matters relating to the right of Mrs. Graves to obtain damage against Mrs. Drane for trespass and the collection of rent, all of which were disposed of by the Court before taking up the question of the validity of a tax deed. The Court in this case has used some very strong and forcible language in its opinion rendered herein, which is as follows:

"We need not further comment (referring to the foregoing construction of the questions involved) on the error of the Court in so doing, and which leaves for consideration the only remaining question that we deem proper to refer to and discuss, and which is the effect of the Tax Receiver's deed executed to Faust in 1930 and his later conveying his claim to the defendant herein.

"It is conceded by plaintiff's counsel that a tax deed is not only presumptive evidence of regularity and complies with the applicable law, but also its effect, in sales of real estate in the collection of taxes due the Commonwealth and counties is to convey the taxpayer's title to the tax sale purchaser under the provision of Sec. 4154 of our present Statutes. Section 3004 which is a part of the Charter of the Cities of the First Class, to which the City of Louisville belongs, deals with the same question as applies to the sale of real estate in the collection of taxes due first class cities, and the relevant portion of it is: '*If the land be not redeemed within two years from the date of sale, a fee simple title shall rest absolutely in the purchaser, subject only to State taxes. Thereupon the Tax Receiver then in office shall convey the prop-*

erty by deed to the purchaser who shall then be entitled to the possessions of the property and have the right to recover same by suit or motion as may be found most appropriate; Provided it shall be the duty of the purchaser other than the City, to pay all later tax bills owing to the City, with interest, as provided in Section 2298 which were assessed against that property after the assessment of the tax for which it was sold, and the Tax Receiver shall not convey the property to such a purchaser until all such tax bills have been paid. Such deed shall be prima facie evidence of the regularity of the sale, and all prior proceedings and title in the person to whom the deed has been executed." (Emphasis supplied.)

Faust complied with all these provisions before he received a tax deed and therefore, under the Statute, was entitled to the possessions of the property.

"But counsel insist that a provision found in Section 3001 of the same Statute, and being a part of the same City Charter, qualified the effect of Section 3004 so as to give the tax purchaser after obtaining his tax deed only a lien upon the property purchased by him when there are other prior liens against it of record and that contention is based on this excerpt from Section 3001—'Except that where there are bona fide mortgages or vendor's lien of record on real estate, only liens now given by law shall be enforced by such sale.' It is contended by plaintiff's counsel that the excerpts so made from that section has the effect of merely subrogating the purchaser to the right of the City and gives him only a lien upon the property.

Clearly, the Legislature did not intend to repeal in toto Section 3004 by the adoption of that excerpt as a part of 3001, and the connection in which it is employed clearly indicates that no such purpose was entertained. On the contrary, the excerpt was really surplusage, since the sale of property for the purpose of enforcing tax liens was never regarded as a proper proceeding for the enforcement of prior contractual liens upon the same property, and the purchaser at the sale of the property so encumbered took it subject to the lien of such encumbrance, but with a prior lien for the amount he had paid with interest, penalties, etc. So far, *however, as the owners of the property were concerned, even in that case (and without exception) the later title would be conveyed and the excerpt was but an expressed incorporation in the Statute of that prior universally applied principle of law. The framers of the Statute evidently wanted it distinctly understood that such prior existing liens could and would not be enforced in the proceedings provided for the sale of property for taxes."* (Emphasis supplied.)

The foregoing language of the Court should be and is certainly strong enough to contradict the contention of the petitioner that this deed to C. C. Brunner is void, *ab initio.*

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED.

The petitioner sets out in his petition from pages 15 to 33 inclusive the questions which he seeks to have reviewed. It seems that he is premature in seeking a review of the questions therein as he has not exhausted his rights under the state laws, through the various State Courts of the state.

If this Statute is arbitrary or repugnant to the Constitution the test should be made under the State laws, before the Supreme Court should be called upon to rule upon a question that has not been tried in the State Courts.

KRS 411.120—ACTION TO QUIET TITLE.

Petitioner recites the foregoing section of the Kentucky Revised Statutes as one of his grounds to invoke the jurisdiction of this Court, but it is contended by respondent that section has no effect whatever upon the matters involved in this action, the entire law governing levying and collection of taxes in Cities of the First Class is found in KRS 91.010 *et seq.*, and the City ordinances in accordance therefo.

"The mere assertion in a State Court of a Federal right in a petition for rehearing affords no grounds for invoking the jurisdiction of the Supreme Court unless the Court below in dealing with the petition considers and passes upon the Federal grounds relied upon. Rowe v. Scott, 233 U. S. 658, 58 L. Ed. 1141.

CONSTITUTIONAL PROVISIONS NOT INVOLVED.

Respondent relies unconditionally upon the record in this cause for his defense herein and cites the opinion of the Court of Appeals in upholding the decisions of the trial Court and the statutes.

The only real question before the Court at this time is whether or not the default judgment rendered herein is a valid judgment under the law of the state of Kentucky, the same having been upheld 3 times by the highest Court of the State, the Court of Appeals of Kentucky, see Richardson v. Brunner, 327 S. W. 2d 572, and Richardson v. Brunner, 328 S. W. 2d 530.

This seems to be sufficient to clearly establish the validity of the judgment herein.

IN CONCLUSION.

The respondent having fully answered petitioner's petition herein, prays this Honorable Court that the Writ of Certiorari to the Court of Appeals of Kentucky be denied, and that petitioner's petition be dismissed.

C. L. Bell,
Attorney for Respondent,
C. C. Brunner.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 585

RALPH RICHARDSON, Petitioner,

C C BRUNNER, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONER

FRANK E. HADDAD, JR.
Kentucky Home Life Bldg.
Louisville, Kentucky,

HECTOR E. ROSE, and
ROBERT HUBBARD.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 199.

No. 585

RALPH RICHARDSON, *Petitioner,*

vs.

C. C. BRUNNER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF OF PETITIONER IN TWO PARTS

PART I

DETAILED REPLY TO STATEMENTS AND ARGUMENTS IN RESPONDENT'S RESPONSE pp. 1-5

Reply to "Historical Statement"

Respondent, p. 1, says:

"They also charge that counsel for C. C. Brunner made misleading statements to the petitioner, but upon examination of the record in the case we find that the petitioner was not ignorant, poverty stricken or misguided, but a

selfish imposing individual, who thought only of himself * * * ."

On pp. 2, 3, 4, 5, he says:

"He received additional tax bills for the years 1951 and 1952 but he still failed to pay his taxes or redeem his property but collected his rents and permitted this respondent to pay his taxes for the additional two years, during which period he had the privilege of paying the delinquent taxes with interest and penalties, but still he elected to let this respondent pay the tax while he collected the rent and spent it for his own use and benefit.

"For further evidence of the insincerity of petitioner's claim that he was prevented from paying his tax, and redeeming his property by the exorbitant price and strict demands of the respondent's counsel, and that he attempted to pay his taxes before expiration of redemption period, and that he was denied due process of law, falls that because he would not have had to come to respondent if he had sought in good faith to redeem his property within the time allowed by law; for that is done in the office of the Tax Receiver and the purchaser has no choice in the matter, but to receive his refund plus interest and penalties."

Then he quotes KRS 91.510 and continues:

"This the taxpayer, Ralph Richardson, the petitioner herein, neglected to do; thus the Court can readily see from the law herein that the petitioner is not sincere when he claims that he was prevented by the exorbitant demands of counsel for respondent, from redeeming his property within the time allowed by law, thereby denying

him due process thereof."

"Petitioner states in his petition, page 11, second paragraph, clause (2) 'That petitioner tried to redeem his property within the time allowed by law and before his property was conveyed by City Tax Deed.' This effort certainly was not in good faith, if it had been petitioner would have been able to redeem the same and Brunner, the respondent, would not have had any choice in the matter, and the Tax Receiver would not have executed the deed to C. C. Brunner."

Petitioner's Reply To The Above Statements

In his uncontradicted affidavits, among other things, petitioner says:

"VI. That affiant approached the representative or attorneys for the Plaintiff on several occasions and was unable to deal with them because they wanted more than the taxes, interest and penalties; and that on one occasion he offered to redeem—within the time allowed for redemption, as he now recalls—his property from tax sale by offering the Plaintiff's representatives $1,000.00 and to pay the difference on the balance in monthly payments, and that this offer was more, far more, than the amount of taxes, interest and penalties then due; . . ."

R. p. 32

and,

". . . That Mr. Gathright told him that he was washed out, that Mr. Brunner owned the fee

simple title and that this affiant did not have any interest in it, and that if he wanted to buy the property back he would have to get $7,035.00 cash on the line, that it would not be accepted in payments. * * * "

"When he had conversations with Mr. Brunner's attorney in the summer of 1955, Mr. Brunner's attorney did not inform him of his rights. Mr. Brunner's attorney did not tell him that the deed were void ab initio. Mr. Brunner's attorney did not tell him that the Tax Receiver violated the statute in selling more real estate than was necessary. Mr. Brunner's attorney did not tell him that it was the Tax Receiver's duty to distrain and sell his personal property first. In short, Mr. Brunner's attorney did not inform him of any of his rights, but concealed all of his rights from him." R., p. 107.

In *Crescent Grocery Company* vs. *Vick*, 240 S. W. 388, 194 Ky. 727, at p. 729, the Court of Appeals of Kentucky said:

"Actionable fraud may consist as well of suppression or concealment of material facts as in the assertion of what is false, for the gist of the action is the production of a false impression upon the mind of the party misled to his injury."

For many opinions, not only from Kentucky but from practically every state in the union, and from this Court, to the same effect, see Sec. 78 p. 851 of Vol. 23 *Am. Jur.* From Petitioner's uncontradicted affidavits, which respondent didn't even attempt to deny, it is readily seen that the respondent not only misrepresented material facts, namely, that the respondent was the owner of the property and that the

petitioner was washed out, but concealed from the petitioner his rights under KRS 91.510 and concealed from him other material rights which they knew he had.

Respondent was and is most generous. He and his counsel were and are shining examples of generosity. Respondent generously, yes, very generously, paid petitioner's city taxes. Then, when he had paid less than $1,000.00 in taxes, he and his counsel were so magnanimously generous, and indeed amazingly so, that they demanded $7,035.00 "cash on the line" to let him have his property back. Wonderful, oh wonderful generosity!

Respondent and his counsel were and are paragons of the very brilliant essence of unselfishness. Why, when respondent had paid less than $1,000.00 in taxes on petitioner's property, he and his counsel were so incredulously—indeed unbelievably so—unselfish that they demanded of petitioner "cash on the line" more than seven times what respondent had been out. They were so free from selfishness that they were unwilling to inform petitioner of his rights under KRS 91.510, namely, that he could go to the Tax Receiver, pay his taxes, interest and penalties, and have his property free from respondent's claims. Oh, wonderful, amazingly wonderful unselfishness of respondent and his counsel!

Sincerity—good faith—doubtless respondent and his counsel are the very essence, the very brilliance, of sincerity and good faith. Why, they even told the petitioner that he was washed out, that the respondent

owned the property, that the petitioner had no interest in it. Oh, oh! So sincere! They doubtless knew that he was illiterate and did not know his rights. Hence they—oh sure, sure indeed—in sincerity and good faith (because of their unselfishness) concealed from—did not mention to—petitioner his rights under KRS 91.510 upon which they now so glibly rely.

Rents—Neglect—Diligency—Petitioner's uncontradicted affidavits, R. pp. 18-20, R. p. 52-53, R. p. 107, show (1) that he diligently tried to settle with respondent, but respondent's demands were so exorbitant that he not only could not meet them, but could not employ counsel to advise and assist him. Respondent was very diligent in demanding far more than he was entitled to and out of petitioner's rents. R. p. 93-94, 98-100, 102.

On p. 2 of his Response, he says:

> "* * * yet he permitted his tax bills to accumulate and to become delinquent for the year 1950, at which times his property was duly advertised for sale pursuant to law in the daily papers and posted in the City Hall as required by Statute.
>
> "He failed to appear and pay his tax in due time and at the time and place designated in the notice of sale a tax bill for the year 1950, his tax bill against the property herein, was sold to the respondent C. C. Brunner."

Then, on p. 4 of his Response, he says:

> "This petitioner had plenty of time to redeem his property if he had not slept upon his rights to redeem before Judgment. * * *."

Reply

There is no proof by pleading, affidavit, or otherwise, in this (said statements are mere unsupported assertions) record that petitioner's property was "duly advertised * * * as required by Statute." Indeed petitioner sought for discovery purposes to take proof on these various points and on other matters, but respondent objected (no doubt in sincerity and in good faith) and the Court, erroneously as we very earnestly maintain, sustained respondent's objection. R. pp. 29-32. Your petitioner sought to take depositions of the City Tax Receiver and of the respondent to discover whether or not in the sale of petitioner's property for city taxes the Tax Receiver had complied with KRS 91.470 and KRS 91.480 (1) and (2). Your petitioner wanted to know whether the Tax Receiver had under KRS 91.470 made any attempt whatever to destrain his, petitioner's, personal property for taxes. Petitioner wanted to know under KRS 91.480 why the Tax Receiver had sold three pieces of real property when the sale of one would have been more than sufficient to pay the taxes on all three. Your petitioner wanted to know whether the Tax Receiver had held a public auction or whether or not he had just sat around the table with a few cronies and let them select the properties that they wanted to buy. Your petitioner wanted to know whether the Tax Receiver had complied in all respects in the sale of his property that are required by KRS 91.470 and 91.480 (1) and (2)

We sincerely (or does sincerity and good faith rest only in respondent and his counsel?) maintain that the petitioner was entitled to take proof on these points and that the Court erred in declining to let him take it. It is very significant, we maintain, that the respondent not only prevented the petitioner from taking such proof, but failed and refused to give any such proof either in affidavit form or otherwise. It seems to us that the respondent wanted to suppress very vital information.

Petitioner did not sleep on his rights. In due time, yes, ample time, he undertook to settle with respondent and redeem his property long before suit was filed, yes, within the time specified for the redemption of his property. But, oh, unfortunately, how unfortunate, indeed, he went to the wrong parties, namely, respondent and his counsel, who concealed from him his rights and demanded exorbitant amounts from him.

Respondent, p. 4, says:

> "After suit was filed and defendant having been duly served * * * ."
>
> " * * * counsel for plaintiff filed several pleadings in the case and mailed copies to the defendant with full postage affixed thereto and none were returned, but still no defense was made by the defendant or any settlement attempted although suit was filed and service made. Finally after several days of delay counsel for plaintiff, C. C. Brunner filed motion for judgment and mailed copy postage paid, to defendant and upon the failure of defendant to answer, judgment was

rendered in favor of plaintiff, C. C. Brunner on October 22, 1956. See Petitioner's petition, Appendix V."

In reply to this, we wish to state that the record discloses ONLY ONE pleading, namely a notice to refer the case to the Commissioner—R. pp. 12 and 13—was ever mailed to petitioner. There is no claim that the complaint was mailed to him.

Respondent, p. 5, says:

> "This judgment is a regular valid judgment, entered properly under the law and is not void *'ab initio'* as contentended by the petitioner."

In reply to this statement the petitioner has never claimed that the default judgment was or is void *ab initio*, but he has and still does most earnestly contend that the City Tax Receiver's deed of petitioner's property to respondent was and is void *ab initio*. See "D," pp. 18-20 of his petition. Petitioner did claim, and still most earnestly maintains, that the default judgment is and was void; that he had a right to move the Court at any time to set it aside; that it conveyed no rights or interest whatever in respondent to petitioner's property involved herein; and that, therefore, it took petitioner's property without due process of law. See "A," "B," "C," "D," "E," "F," "G," and "H," pp. 16-26 of Petition.

Respondent on page 5 says:

> "The only question here is whether or not the judgment is authorized by statutory provisions."

That is not the question involved in petitioner's petition except only as it affects the constitutional valid-

ity of KRS 91.540. One and only one question is presented in his petition. It is, has petitioner's property been taken without due process of law? This question has a two-fold aspect, first, is not the taking of property under void judgment taking it without due process of law; second, is not KRS 91.540 in violation of both Kentucky and United States constitutions in that it takes property without due process of law? See "II," pp. 23-26 of Petition, and Part II of this brief, pp. 27-32.

Reply to "Chapter 91 of the Kentucky Revised Statutes" and to "Constitutionality Not Questioned," pp. 6 and 7 of His Response and to Other Similar Statements in His Response.

Respondent, on p. 6, says:

> "The validity of these statutes has never been questioned."

On p. 7 he says:

> "The constitutionality of this law has never been attacked by the taxpayer, and now stands within the Statutes inviolate."

On p. 8 he says:

> "Respondent insists that no constitutional questions have been raised in this Court and, especially in the Court below."

On p. 10 he says:

> "KRS 91.480 and 91.540 are valid statutes the Commonwealth and have never been questioned or attacked by this petitioner or anyone else as to their constitutionality and for this and

other valid reasons, respondent contends that this Court has no jurisdiction * * * ."

On p. 11 he says:

"The Supreme Court has no jurisdiction where alleged unconstitutionality was not raised below."

Again, on p. 11 he says:

"Petitioner has not raised any constitutional question, * * * ," etc.

On p. 16 he says:

"The validity of the statute that governs this petition is not before the Court and was not before the Trial Court below."

On page 34 of his response he says:

"The petitioner sets out in his petition from pages 15 to 33 inclusive the questions which he seeks to have reviewed. It seems that he is premature in seeking a review of the questions therein as he has not exhausted his rights under the state laws, through the various State Courts of the state.

"If this Statute is arbitrary or repugnant to the Constitution the test should be made under the State laws, before the Supreme Court should be called upon to rule upon a question that has not been tried in the State Courts." * * *

If the default judgment was and is not void as we earnestly contend that it is because the Court below had no jurisdiction over the subject matter (see "E," "F," and "G," pp. 20-23 of Petition) and, therefore, did not invest in the respondent any rights whatsoever

in the property involved, and, therefore, took petitioner's property without due process of law contrary to both Kentucky and Federal constitutions. Petitioner would not now be seeking redress in this Court. Petitioner raised this question in the Court below. In the Court below petitioner most certainly insisted and contended that KRS 91.540 is unconstitutional and contrary to both the Kentucky Constitution and the Constitution of the United States, see "II." Petition, pp. 22-26 and Appendix VI a. and Appendix VI b. pp. 52-56 of his Petition. If petitioner had not raised these questions in the Court below, he would not now be seeking redress in this Court. Certainly petitioner has raised these questions and they are now before this Court.

On p. 7 of his Response, respondent quotes from the opinion of *Johnson, Governor, Commonwealth, ex rel Meredith, Attorney General*, 291 Ky. 829, 165 S.W. 2d 820. From that quoted by the respondent, we requote the following:

> "* * * Section 26 of the Constitution declares that all laws 'Contrary to this Constitution shall be void.' Our functions are to determine the constitutional validity and to declare the meaning of what the legislative department have done. We have no other concern." * * *

Although the constitutionality of KRS 91.540 was raised both before the trial Court and the Appellate Court, neither one of them passed upon it or even explained or gave a reason for not doing so. We know not why. We will not speculate. We only know two things: (1) that these questions were raised; (2) that

we could not compel the lower courts to pass on them or even to explain why they failed to do so.

Reply to "Jurisdiction," pp. 8-12 of Respondent's Response.

We have already replied to the "Jurisdiction" in part, and we now address a few remarks to eight Supreme Court cases on pp. 9 and 10 of his response from which the respondent apparently—not actually nor verbatim—quotes. We have carefully read each and every one of those eight opinions. On page 10 he cites *Willoughby* vs. *Chicago*, 235 U.S. 45, 59 L.Ed. 123, and *Cleveland & P. R. Co.* vs. *Cleveland*, 235 U.S. 50, 59 L.Ed. 127; *Missouri Pac. R.R. Co.* vs. *Hanna*, 266 U.S. 184, 69 L.Ed. 235; *Mellon* vs. *O'Neil*, 275 U.S. 242, 72 L.Ed. 245; *White River Lbr. Co.* vs. *Arkansas ex rel Appiegate*, 279 U.S. 692, 73 L.Ed. 903. We respectfully submit that no one of these cases is applicable to the case at bar.

We have also read the case of *People of State of New York, ex rel. Cohn* vs. *Graves*, 300 U.S. 308, 81 L.Ed 666. In that case this Court did grant the petition, but affirmed the New York court in all respects except one, and in that respect this Court held that the case was not properly before it, and we, therefore, respectfully submit that that case has no application to the case at bar. We have also read the rather lengthy opinion of this honorable Court by Judge Brandeis in *Thompson* vs. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L.Ed. 510. The appeal was

granted in that case but this Court affirmed the District Court for the Western District of Texas. We respectfuly submit that that case has no application to the case at bar.

We have also read the case of *Honeyman* vs. *Hanan*, 300 U.S. 14, 81 L.Ed. 476. In that case the appeal was granted and a judgment of the New York court vacated and remanded for further proceedings consistent with this Court's opinion. This Court towards the close of its opinion, 81 L.Ed. at p. 483, said:

> "IN THE EXERCISE OF OUR APPELLATE JURISDICTION WE HAVE POWER NOT ONLY TO CORRECT ERRORS IN THE JUDGMENT UNDER REVIEW BUT TO MAKE SUCH DISPOSITION OF THE CASE AS JUSTICE REQUIRES."

To the same effect see *Patterson* vs. *Alabama*, 294 U.S. 600, 607, 79 L.Ed. 1082, 1085, 55 S.Ct. 575, and *Villa* vs. *Van-Schaick*, 299 U.S. 152, 81 L.Ed. 91, 57 S.Ct. 128.

At this point we respectfully submit that this honorable Court in justice should not only grant this petition, but go further and reverse the lower court.

It will be noted that the respondent puts in quotations what purports to be said in the opinions in those cases. We merely remark that upon a very careful reading of those opinions, we were not able to find a verbatim quotation from anyone except *Cleveland and P. R. Co.* vs. *Cleveland, supra.* We most respectfully submit, therefore, that there is no merit in

respondent's contention that Federal questions were not presented in the lower court and for that reason this Court has no jurisdiction.

Reply to "Petitioner Under Statement of Material Facts, Pages 5-14, Inclusive," Response p. 14.

Under this heading on page 14, respondent says:

> "Petitioner just assumes the Tax Receiver failed to comply with the statutory provisions in the sale of the property at the Tax Sale."

We have already touched upon this, pp. 7-8 above, but for further reply to it we respectfully submit that the affdavits, R. pp. 17-21, R. pp. 48-54, R. pp. 106-108, and petitioner's tendered Answer and Counter-claim, R. pp. 36-37, clearly and unequivocally refute the above statement in respondent's response to the effect that the petitioner is merely assuming that the Tax Receiver failed to comply with the statutory provisions in the sale of this petitioner's property.

Reply to "Life History of Petitioner Does Not Present a Federal Question," Response pp. 14-15.

Under this heading respondent says:

> "None of the objections relied upon by the petitioner for his defense in the Court of Appeals or in this honorable Court were in the record of Trial Court before judgment."

For a reply to this, petitioner merely states that a void judgment may be set aside at any time, and petitioner moved the Court to set aside the void judg-

ment and supported his motions by affidavits containing facts which showed that the judgment was void for two reasons; first, the Court did not have jurisdiction over the subject matter; and second, because it was founded upon an unconstitutional statute, namely, KRS 91.540.

Reply to "Questions Before the Court" and to "So Plain That a Child Can Understand," pp. 16-20. Inclusive of Response.

We call the Court's attention first to the fact that respondent omits KRS 91.470 and he also omits subsections (1) and (2) of KRS 91.480, but that he does quote verbatim subsection (3) of KRS 91.480.

We here call the attention of this honorable Court to the fact that in the cases of *C. C. Brunner* vs. *Louise E. Bell* (Ky.), 290 S.W. 2d 461 and *C. C. Brunner* vs. *Ethel Morgan* (Ky.), 317 S.W. 2d 882, the appellant in each of those cases was the same Mr. C. C. Brunner who is the respondent in this action, and his counsel in this action are the same counsel that represented him in those actions, and they are making the same contentions or arguments before this Court in respect to KRS 91.480 (3) that they made in those cases.

The Court will note that the respondent repeats three times, p. 18, p. 20, and p. 23, the verbatim provision of subsection (3) of KRS 91.480, but omits KRS 91.470 and paragraphs (1) and (2) of 91.480.

The best reply that we can make to this argument of the respondent is to quote what the Court of Appeals of Kentucky said in *Brunner* vs. *Bell*, *supra*, and

in *Brunner* vs. *Morgan*, *supra*. In *Brunner* vs. *Bell*, *supra*, this Court said:

"Brunner purchased, at public sale, a tax bill for unpaid city taxes on the property in question for the year 1950. The appellee failed to redeem the property within the next two years, as permitted by KRS 91.510(1), and a tax deed was thereupon issued to the purchaser of the tax bill, as provided by KRS 91.540. Brunner paid the city taxes for the years 1950, 1951, and 1952.

"In her deposition the appellee said that she attempted to pay the city taxes in 1952, but her money was refused by a clerk at the Tax Receiver's office. She was informed that her taxes had already been paid, but the clerk was unable to tell her who had paid them. She was not informed that a tax bill to her property had been sold, and was not told of her statutory right of redemption.

"The appellee attacked the validity of the tax deed by an allegation that, at the time of the sale of her real estate for unpaid city taxes, she owned personal property, valued at more than one thousand dollars, which could have been levied upon, and which would have more than satisfied the tax claim. Brunner does not dispute that assertion, but relies solely upon his tax deed to support his claim to the property.

"Brunner contends that the trial court's judgment is erroneous due to the provisions of KRS 91.480(3). That statute states in part, " * * * no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both." The provision, lifted

out of context, would seem to sustain his contention; but its real meaning can be obtained only by reading it in conjunction with other related provisions of the statutes.

"KRS 91.470 expressly provides for the sale of personal property for the satisfaction of city taxes. It states in part that ' * * * the tax receiver shall, immediately upon the filing of the lists of unpaid tax bills, distrain the personal property owned or in the rightful possession of the taxpayer, notwithstanding the existence of any lien, except the lien for state taxes, upon the property, and may proceed to sell the title of the taxpayer in a sufficient amount of the property to pay the tax, penalties, interest and costs.' *Following* that provision, KRS 91.480 provides for the sale of real property to satisfy city taxes. Sub-section 1 provides for such sales "If no personal property is reasonably available out of which the tax bill can be collected by distraint * * * "

"(1, 2) When the language of KRS 91.480(3), upon which Brunner relies, is considered in the light of the foregoing sections of the statutes, we think it means that no levy or attempted levy upon personal property is necessary to validate a sale of real property *if such levy or attempted levy would necessarily be futile and useless.* Typical situations where the statute would apply would be where the Tax Receiver knows that no personal property exists, or that existing personalty is exempt from execution, or encumbered previously by superior liens which, in any event, would exhaust its entire value. In such situations, and perhaps others, of course, real property of the delinquent city taxpayer can be sold without first levying or attempting levy on his personal

property. This interpretation is consistent with that which we have applied to earlier statutes treating the same subject. See Taylor v. City of La Grange, 262 Ky. 383, 90 S.W. 2d 357, and Allen v. City of Harrodsburg, 247 Ky. 360, 57 S.W. 2d 45, wherein we held that city tax collecting officers must exhaust personal property of the delinquent before proceeding against his realty.

"(3) In the case before us, it is undisputed that the appellee's personal property could have been levied upon to satisfy fully the City's tax claim against the property. Under these circumstances, the sale of the real property, without first exhausting the available personal property, was contrary to the statutes, as we construe them. We have held consistently that proceedings to sell property for taxes must conform to statutory provisions, and proceedings which fail to do so are void. See Interstate Bond Co. v. Williams, 290 Ky. 850, 162 S.W. 2d 770; Smith v. Isom, 257 Ky. 554, 78 S.W. 2d 752.

"Hence, the deed upon which Brunner relies is void; and the trial court properly quieted the appellee's title to her property.

"The judgment is affirmed."

The opinion in *Brummer* vs. *Morgan, supra,* is very short and we repeat it verbatim as follows:

"This contest involves the title obtained by appellant, C. C. Brunner, to certain real estate situated in Louisville, Jefferson County, Kentucky, under a tax deed. The Chancellor adjudged the deed to be void.

"The sole question presented in whether it is mandatory under KRS 91.470 that a levy be made

upon personal property before the taxpayer's real property may be sold for the collection of taxes.

"Appellee, Ethel Morgan, by uncontradicted proof, showed that she owned personal property out of which the pertinent taxes could have been collected. *No effort was made by the tax collector to discover any personal property upon which to make a levy except an unsuccessful examination of his record.*

"Appellant contends that KRS 91.480(3) renders directory KRS 91.470 and 91.480 (1) (2). The same contention was unsuccessfully made in Brunner v. Bell, Ky., 290 S.W. 2d 461. A full discussion of the statutes and principles involved is contained therein. Brunner v. Bell, supra, is controlling here.

"Judgment affirmed."

Reply to "Additional Points And Authorities" of Respondent's Brief, pp. 21-29, and to "Important Decisions," pp. 21-33 of Response.

Under the heading "Additional Points and Authorities" respondent quotes from four opinions, two from the Court of Appeals of Kentucky, one from Texas, and one from Arkansas. Let us examine them. The first case is that of *Dalton* vs. *State Property and Building Commission* (Ky.), 304 S.W. 2d 342. From that opinion we look into the background of the action.

"The case tests the validity and strength of the foundation of a proposed issue of bonds of the Commonwealth of Kentucky in the aggregate of $100,000,000, the proceeds of which are to be

used to match funds that may be allocated to Kentucky for highway construction by the national government. The proposition was submitted to the voters at the November, 1956 election and resulted in 511,656 votes being casted in favor and 85,635 votes cast against it. * * * The General Assembly at its second extraordinary sesssion, which convened March 9, 1956, passed an act, chapter 3, authorizing the execution, sale and delivery of one hundred million ($100,000,000) Dollars principle amount of Commonwealth of Kentucky bonds, the proceeds from the sale of which will be used to match federal funds for the construction of highways, bridges and tunnels in the Commonwealth of Kentucky, and providing for the submission thereof to the voters at the general election to be held on November 6, 1956. * * *

"Section 4. The heart of the Act, is heavily assailed. It is quoted in part.

> "'Section 4. * * * In order to provide for the payment of the principal of all of said bonds at their maturity and the interest thereon annually as same shall accrue, there shall be levied and collected in each of the thirty years from January 1, 1957, to January 1, 1987, taxes for the benefit of the State Road Fund in the form of license, excise taxes and fees relating to registration, operation and use of vehicles on public highways and excise taxes, use and license taxes relating to gasoline and other motor fuels used upon the public highways in Kentucky * * *!' "

Six sections in Kentucky's constitution, namely, 47, 49, 50, 178, 181, and 230, are mentioned in the opinion. Section 47 states that bills for raising revenue

shall originate in the House. The bill involved originated in the Senate. The Court correctly held that the bill in question was not one for raising revenue and therefore did not violate Section 47 of the constitution of Kentucky. We agree. The Court held that the act in question specified the purpose for which the debt (bonds) was to be created and was not in violation of Section 49 of the Kentucky Constitution. We believe the Court was correct. The chief controversy arose out of the language of Section 50 of Kentucky's constitution which says in part, quoting from the opinion, p. 347:

> "Section 50 of the Constitution, quoted above, declares that no contract shall be made or debt incurred by the States 'unless provision be made in the Act of the General Assembly 'to levy and collect an annual tax sufficient' to pay interest upon and discharge the debt within thirty years."

Now, the act in question did not embody the exact words "levy and collect an annual tax" but did say what we have just quoted above from Section 4 of the act. In concluding that Section 50 of the constitution of Kentucky was not violated the Court, among other things, said:

> "Of course, motor vehicles and such taxes here made applicable to the payment of the debt were unknown when the Constitution was adopted." * * * "Though the registration and licenses may be collected annually, the motor fuel and sale excises are daily taxes." * * *
>
> * * * * In all the circumstances, we reach the conclusion that the pledge and commitment of

> the Act is to provide a tax in each of the thirty years as may be deemed annually sufficient to pay annual and other timely requirements of the bond issue, and that this is a substantial compliance with 350 of the Constitution."

We agree with the Court that the act in question did not violate Sections 47, 49, 50, 178, 181 or 230 of Kentucky Constitution, but we vigorously maintain that that opinion does not in the slightest degree support respondent's contention that said opinion upholds the constitutionality of KRS 91.540. In that opinion the Court said:

> "This judicial position of saving legislation if possible is rooted in the doctrine that a state constitution is not a grant of power but is a limitation on the power of the Legislature and that that department of government posseses and may exercise within constitutional limits all legislative powers as it sees fit. It may enact any law not expressly or impliedly prohibited by the Constitution of the state or the nation."

The Court will note that the legislature must act within constitutional limits, but it may not enact legislation prohibited by the constitution of the state or nation. It is petitioner's most earnest contention that KRS 91.540 violates Sections, 2, 26, 27, 59(12), and 109 of the Constitution of Kentucky, and that it clearly violates paragraph 1 of the Fourteenth Amendment to the Constitution of the United States. We shall under Part II develop these ideas more fully, but at this point we maintain that said section of the statute

violates Section 27 of the Constitution of the State of Kentucky in that it vests in the Tax Receiver (a ministerial officer) both executive powers and judicial powers in that it vests in him (1) the power and authority to be the sole judge of his own acts, that is, whether or not in the sale of the property for taxes he has complied with the mandatory statutory provisions of KRS 91.470 and 91.489(1)(2); (2) it authorizes said Tax Receiver to convey the fee simple title of the taxpayer's property without giving said taxpayer any kind of hearing, judicial or otherwise, to determine whether said Tax Receiver, in the sale of said taxpayer's property complied with the mandatory provisions of the aforesaid statutes. Such power and authority in the Tax Receiver is nothing short of taking taxpayer's property without due process of law. KRS 91.540 violates 109 of the Kentucky Constitution for the same reasons. It most certainly and definitely violates Section 2 of the Constitution of Kentucky for it vests in the Tax Receiver, a ministerial officer, the "absolute and arbitrary power" over taxpayer's Property to confiscate—to convey the fee simple title without giving taxpayer an opportunity to be heard as to whether or not in the sale the mandatory provisions of the aforesaid statutes have been complied with, which certainly amounts to a taking of the taxpayer's property without due process of law.

Respondent further quotes from the Dalton opinion, *supra* as follows:

> "Indeed, the presumption is that a proviso in a statute refers only to the provision to which it

is attached, and, as a general rule, a proviso is deemed to apply only to the immediate preceding clause or provision."

Then some comments, and quotes again in full (3) of KRS 91.480, contending as he did in *Brunner* vs. *Bell*, and in *Brunner* vs. *Morgan*, *supra*, that (3) of KRS (3) of KRS 91.480 is controlling, but neither (3) of KRS 91.480 nor the last sentence of KRS 91.540, "the deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed," can cure the unconstitutionality of KRS 91.540. Said section 91.540 is contrary to sections 2, 26, 27, 59(12) and 109 of the Kentucky Constitution. We shall only mention two reasons here, first, because it vests in the Tax Receiver both executive and judicial powers contrary to section 27 of the Constitution, and it gives him an absolute and arbitrary power over the property of freemen. Hence, without due process of law.

We have not read the case of *Sheffield* against the *State of Texas*, 307 S.W. 100, cited on page 23 of respondent's response, but reading what is quoted, we respectfully submit that that case has no bearing upon the case at bar.

We have carefully read the case of *Bedinger* vs. *Graybill's Executor and Trustee*, 302 S.W. 2d 594. The question involved in that case was one of construction of the adoption statute as to whether or not it was against public policy. We are unable to see that it has any bearing on the case at bar. There was no constitutional question involved. The Arkansas

case of *Leonard* vs. *Thompson*, 306 S.W. 2d 869, is not applicable because there was a foreclosure sale in that case—none in the case at bar. Respondent on pages 26 and 27, says:

> "KRS 91.470 provides for the collection of taxes; that the tax receiver shall restrain the personal property of the taxpayer if any to be found owned or rightfully in the possessions of the taxpayer, to satisfy the taxes, but this section makes no direct provision for the collection of taxes on real property. It apparently referred to and was for the purpose of providing the means for the collection of personal property taxes. The record in this case clearly demonstrates the fact that the taxpayer not only did not have any personal property upon which the tax receiver might levy or distrain, but that he had never listed any personal property upon which the tax receiver might levy or distrain, but that he had never listed any personal property for tax purpose as required by law. KRS 91.480 provides the procedure that the tax receiver shall pursue for the collection of taxes due and unpaid upon real property in the City of Louisville and that sub-section 3 of said Statute in no uncertain terms states that:
>
> "'No levy or attempted levy upon personal property shall be necessary to validate any sale of real property whether for taxes on real property, personal property or both.'"

We respectfully submit that the above statement is answered in *Brunner* vs. *Bell*, *supra*, and *Brunner* vs. *Morgan*, *supra*, and by this Record. *It is really amazing how careless respondent is in reference to the uncontradicted and undisputed fact, contained in*

and shown by the record, namely, that petitioner had, at the time his property herein was sold, more than ample personal property to satisfy the taxes on said real estate involved herein. And furthermore, there is no proof whatsoever in this record that petitioner did not list personal property for taxes.

We now pass to the case of *Drane* vs. *Graves*, 261 Ky. 787, 88 S.W. 2d 927 in which respondent contends that the court carefully construed the sections of Kentucky Revised Statutes in question. First of all we call the Court's attention to the fact that that was a suit for damages, secondly, that the court was not necessarily called upon to construe the statutes mentioned nor was the question of the constitutionality of any one of them raised. The truth of the matter is that what is quoted by respondent is in reality mere dictum.

PART II

ENLARGEMENT OF ARGUMENT SHOWING THAT KENTUCKY REVISED STATUTE SEC. 91.540 IS UNCONSTITUTIONAL IN THAT IT TOOK PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO BOTH KENTUCKY AND UNITED STATES CONSTITUTIONS.

The present Constitution of the State of Kentucky was adopted on September 18, 1891. The source of sections 2, 26, 27, 59(12) and of 109 of the present Constitution of the State of Kentucky is derived from the Constitution of the State of Kentucky of 1850.

Sections 1-25 of the present Constitution of the State of Kentucky are known as the Bill of Rights.

Section 2 is as follows:

"Sec. 2. Absolute power does not exist in a republic.—Absolute and arbitary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Section 26 reads in part as follows:

"Sec. 26. Bill of rights to remain inviolate.—* * * and all laws contrary thereto, or contrary to this Constitution, shall be void."

Section 27 reads as follows:

"Sec. 27. Legislative, executive, and judicial departments.—The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 59 reads as follows:

"Sec. 59. Limitations upon.-The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

* * * 12. LEGALIZING INVALID INSTRUMENTS, TO GIVE EFFECT TO INVALID DEEDS, WILLS OR OTHER INSTRUMENTS."

Section 109 is in part as follows:

> "Sec. 109. Consists of senate, court of appeals and inferior courts.-The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in * * * and one supreme court (to be styled the court of appeals) and the courts established by this Constitution."

The first paragraph of the Fourteenth Amendment to the Constitution of the United States applies to the power of the state legislature, and, as we have heretofore pointed out, we most respectfully insist that KRS 91.540 is contrary to the above section of the Fourteenth Amendment, Constitution of the United States, as well as contrary to the intent and purpose of the whole federal constitution in that (1) it vests in the city tax receiver an arbitrary power and authority to deprive without a hearing—without due process of law—a delinquent taxpayer of his property; (2) it invests the city tax receiver with judicial power and authority to determine without a hearing or even a hope to be heard whether or not he has sold the taxpayer's property according to the mandatory provisions of the Kentucky statute thereby depriving the taxpayer of his property without due process of law.

In this connection we desire to call the Court's attention to three of their comparatively recent cases; namely, *Morgan, et al.* vs. *U. S., et al.*, 304 U.S. 182, L. Ed. 1129, 58 S.Ct. 773, *Joint Anti-Fascist Refugee Committee* vs. *McGrath, Attorney General of the U.S., et al.*, 341 U.S. 123, 95 L.Ed. 817, and *Gonzales* vs. *U.S.*, 348 U.S. 407, 75 S.Ct. 409. Each of these cases involved the very vital question of the power and authority of

an executive or administrative office or agency to enforce executive orders and regulations issued presumably under statutory authority without giving an opportunity for a hearing. We respectfully invite the court to consider the principles of law set down by it in those cases. In *Joint Anti-Fascist Refugee Committee* vs. *McGrath, Attorney General of the United States, supra*, among other things, this court said:

> "'The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning.
>
> "'The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'"

The Court of Appeals of Kentucky in *Williams* vs. *Wedding, Judge*, 165 Ky. 361, 176 S.W. 1176, held that the provisions of a drainage act depriving the property owner of remedy against the action of the Board of Commissioners, was in conflict with Section 2 of the Kentucky Constitution. In *Slaughter* vs. *Post*, 214 Ky. 175, 28 S.W. 1091 the Court of Appeals of

Kentucky held that an ordinance conferring on the city council power at their discretion to grant or refuse permits for gasoline filling stations, was void contrary to Section 2 of the Kentucky statutes. In *Colyer* vs. *The City of Somerset*, 306 Ky. 797, 208 S.W. 2d 976, the Court of Appeals of Kentucky held that an ordinance giving the city officials power to designate the distance that a building must be set back from the sidewalk in granting building permits, was unconstitutional as against Section 2 of the Constitution of Kentucky.

We have hereinabove and heretofore repeatedly stated that KRS 91.540 combines in a ministerial or administrative officer both judicial and executive powers contrary to Section 27 of the Kentucky Constitution and contrary to 109 of the Kentucky Constitution.

The Court of Appeals of Kentucky, since 1876, has consistently and repeatedly held that a tax deed is void where the provisions of the statute in the sale of the property are not strictly complied with. See *Phillips* vs. *Bannister*, 9 Ky. Opin. 588 (year 1876). *Lamb* vs. *Leach*, 12 Ky. Opin. 237 (year 1883). *Wheeler* vs. *Bramble*, 8 S.W. 199, 10 Ky. Law Rep. 301 (year 1888). And so on down to the present time. Yet in the face of a long line of opinions for nearly 100 years to the present time of the highest court of the State of Kentucky, the legislature has in KRS 91.540 given or granted to the city tax receiver the power and authority "to give effect to invalid deeds"

contrary to Section 59 (12) of the Constitution of the State of Kentucky.

CONCLUSION

Doubtless the framers of our federal constitution were able, patriotic men, men who were profound students of history, of government, of politics, of laws and civil codes, and of human nature. The framers of the Kentucky Constitution of 1891 were doubtless men of the same caliber.

From time immemorial it appears from history, literature, codes of laws and of nations and governments that have come and gone and that now exist, that there are, generally speaking, two philosophies or theories as to the purpose, nature and existence of civil government among men. One is that men, peoples, exist for the government or for those who exercise authority; that people exist for the state. This philosophy or theory excludes and denies to men their inalienable rights, especially the inalienable right to own and possess real estate, property. The other philosophy or theory of government is that government exists for men. In other words, among the most vital purposes for the existence of government is to protect the inalienable rights of the individual man among which is the right to own and possess property which he cannot be deprived of without due process of law, that is, a hearing. This theory of government is embodied in the last words of Lincoln in his famous Gettysburg address:

"AND THAT GOVERNMENT OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE, SHALL NOT PERISH FROM THE EARTH."

The above mentioned theories or philosphies of the purpose of civil government exist in the world today. The people of the State of Kentucky and of the United States of America believe in and hold to the latter theory.

The framers of our federal Constitution and of Kentucky's constitution, doubtless keenly realized that to maintain the inalienable rights of men, among which was and is the right to own and hold property, that among other factors, at least two fundamental principles of government should be embodied in the law—the constitutions—of the land. One, the separation of powers, executive, legislative and judicial. They were well aware of the grievous abuse of power where these separate functions of government were all combined in one or more persons. The other fundamental principle or inalienable right is that men were not to be deprived of their property by arbitrary methods, by seizure or confiscation, that is without due process of law, without a hearing, judicial hearing, of the facts as to whether or not a right, even for taxation, exists to take one's property.

In *Miller, Collector* vs. *Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 52 S. Ct. 260-76 L. Ed. 422; *United States* vs. *Merriam*, 263 U.S. 179, 188, 44 S. Ct. 69, 68 L. Ed. 240, 29 A.L.R. 1547; *Bowers* vs.

N. Y. & Albany Co., 273 U.S. 346, 350, 47 S. Ct. 389, 71 L. Ed. 676, and many other cases, THIS COURT HAS HELD THAT IT IS ELEMENTARY THAT TAX LAWS ARE TO BE INTERPRETED LIBERALLY IN FAVOR OF TAXPAYERS, DOUBTS MUST BE RESOLVED AGAINST THE GOVERNMENT AND IN FAVOR OF TAXPAYERS.

Again we quote from an address of Abraham Lincoln on January 27, 1838, before the Young Men's Lyceum of Springfield, Illinois. He was speaking of dangers that might overthrow or destroy our government. Among other things, he said:

> "At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."

Among the most potent factors in the downfall of all governments that have come and gone is the abuse of taxing power. We do not say this lightly. It is within the provisions of this honorable Court to curb the present tendency in this country to confine executive and judicial powers in tax matters in one person, a ministerial person or executive officer, without giving the taxpayer an opportunity to be heard. For reasons set forth in his original petition and hereinabove set forth, it is most respectfully submitted that in plain, simple justice, petitioner's

petition for a Writ should not only be granted, but that the judgment of the lower court should be reversed.

Respectfully submitted.

FRANK E. HADDAD, JR.

Attorney for Petitioner.

HECTOR E. ROSE

ROBERT HUBBARD

Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 585

RALPH RICHARDSON, Petitioner,

vs.

C. C. BRUNNER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

PETITIONER'S PETITION FOR REHEARING

Rules 25 (2), 58 (2)

CERTIFICATE OF GOOD FAITH, ETC.

Rule 58 (2)

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Rules 25(2), 58(2)

CERTIFICATE OF GOOD FAITH ETC.
Rule 58 (2)

May it please the Court:

On pages two and three of his response, Respondent says:

> "For further evidence of the insincerity of petitioner's claim that he was prevented from paying his tax, and redeeming his property by the exorbitant price and strict demands of this respondent's counsel, and that he attempted to pay his taxes before expiration of redemption period, and that he was denied due process of law,

> falls flat because he would not have had to come to respondent if he had sought in good faith to redeem his property within the time allowed by law, for that is done in the office of the Tax Receiver and the purchaser has no choice in the matter, but to receive his refund plus interest and penalties."

and then quotes verbatim the redemption statute; namely, KRS 91.510.

The opinion of the Court of Appeals of Kentucky in *Brunner* vs. *Bell*, 290 S.W. 2d 461, answers as follows:

> "Brunner purchased, at public sale, a tax bill for unpaid city taxes on the property in question for the year 1950. The appellee failed to redeem the property within the next two years, as permitted by KRS 91.510 (1), and a tax deed was thereupon issued to the purchaser of the tax bill, as provided by KRS 91.540. Brunner paid the city taxes for the years 1950, 1951, and 1952.
>
> "In her deposition the appellee said that she attempted to pay the city taxes in 1952, but her money was refused by a clerk at the Tax Receiver's office. She was informed that her taxes had already been paid, but the clerk was unable to tell her who had paid them. She was not informed that a tax bill to her property had been sold, and was not told of her statutory right of redemption."

It will thus be clearly seen that KRS 91.540 is unconstitutional in that, without due process of law, it vests in the City Tax Receiver the arbitrary power to ignore the redemption statute and convey the fee simple title to taxpayer's property.

Let the Court bear in mind that petitioner was not allowed—erroneously, as he earnestly contends—to take proof for discovery or any purpose. (R. pp. 29-32.)

King John of England, before the granting of the Magna Charta, never exercised a more arbitrary, absolute and despotic taxing power over his subjects than KRS 91.540 vests in the City Tax Receiver. There are thousands in this city affected by it.

For reasons hereinabove set forth and heretofore set forth in his petition and in his reply brief, he most respectfully submits that the order denying his petition be set aside and that his petition be granted. *Flynn* vs. *United States of America*, 99 L. Ed. 1298; *Schriber-Schroth Co.* vs. *Cleveland Trust Co.*, 305 U.S. 47, 50, 59 S. Ct. 8, 9.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH ETC.
Rule 58(2)

I, Frank E. Haddad, Jr., counsel for petitioner, in the utmost sincerity and good faith state: (1) that this petition is not filed for delay; (2) that, although the other substantial ground hereinabove stated was available to petitioner, it has not previously been mentioned; that, in fact, he and his co-counsel on Saturday, February 27, 1960, seriously discussed filing a supplemental reply brief, setting up this ground.

Counsel certifies that this petition for rehearing is restricted to that ground. But, having a deep, honest, and sincere conviction that the Court has erred in denying the petition, he most sincerely, earnestly and respectfully requests the Court, not only to read this petition for a rehearing, but to reread and consider

both the petition and reply brief. Counsel, in some small measure, realizes the heavy burden of this Court, *and yet he most earnestly pleads with it in furtherance of justice to set aside its order and grant the petition.*

"IN THE EXERCISE OF OUR APPELLATE JURISDICTION WE HAVE POWER NOT ONLY TO CORRECT ERRORS IN THE JUDGMENT UNDER REVIEW BUT TO MAKE SUCH DISPOSITION OF THE CASE AS JUSTICE REQUIRES."

Honeyman vs. Hanman, 300 U.S. 14, 81 L.Ed. 476.

Respectfully submitted,

FRANK E. HADDAD, JR.,
Counsel for Petitioner